IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550(b)). In re TOBACCO CASES II This Document Relates to:	
The People of the State of California, and American Environmental Safety Institute v. Philip Morris Incorporated, et al., Los Angeles Superior Court, Case No. BC 194217	JCCP No. 4042
The People of the State of California, City of San Jose, and Paul Dowhall v. Brown & Williamson Corp., et al., San Francisco Superior Court, Case No. 996781	DEPOSITION OF BRUCE G. SILVERMAN VOLUME II (Pages 186 - 413)
SERVICE LIST "B"	

TAKEN ON: Friday, August 4, 2000

TAKEN AT: 550 West C Street, Suite 1440
San Diego, California

REPORTED BY: Jeannette K. Jessup
CSR No. 8573, RPR

APPEARANCES:

FOR PLAINTIFFS IN THE PEOPLE OF CALIFORNIA/AESI:

THORSNES, BARTOLOTTA & MCGUIRE
2550 Fifth Avenue, Eleventh Floor
San Diego, California 92103

BY: CHRISTIAN R. HULBURT, ESQ.

FOR DEFENDANT: PHILIP MORRIS INCORPORATED

MUNGER, TOLLES & OLSON LLP

http://legacy.library.ucsf.edu/tid/bwi07a00/pdf
Support provided by the Industry Documents Library: http://industrydocuments.ucsf.edu/docs/tsjl0001

33 New Montgomery Tower, 19th Floor
San Francisco, California 94105-9781

BY: MARTIN D. BERN, ESQ.

FOR DEFENDANT: BROWN & WILLIAMSON TOBACCO COMPANY

SEDGWICK DETERT MORAN & ARNOLD
801 S. Figueroa Street, 18th Floor
Los Angeles, California 90017

BY: STEPHANIE SHERIDAN, ESQ.

FOR DEFENDANT: R.J. REYNOLDS TOBACCO COMPANY

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
Three Embarcadero Center, Seventh Floor
San Francisco, California 94111-4065

BY: DONALD F. MILES, ESQ.

FOR DEFENDANT LIGGETT GROUP, INC.:

POST KIRBY NOONAN & SWEAT
600 West Broadway, Suite 1100
San Diego, California 92101

BY: JEFFREY P. LENDRUM, ESQ.

FOR DEFENDANT LORILLARD TOBACCO COMPANY:

ALLEN MATKINS LECK GAMBLE & MALLORY
333 Bush Street, Suite 1700
San Francisco, California 94104

BY: BRADLEY P. KAPLAN, ESQ.

APPEARANCES: (CONTINUED)

FOR DEFENDANT: BROWN & WILLIAMSON TOBACCO COMPANY

KIRKLAND & ELLIS
777 South Figueroa Street
Los Angeles, California 90017

BY: TONY L. RICHARDSON, ESQ.

ALSO PRESENT: Michael Gold, AJL Videotaping

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/tsjl0001

I N D E X

WITNESS	EXAMINED BY	PAGE
BRUCE G. SILVERMAN		
	Mr. Richardson	191
	Ms. Sheridan	208
	Mr. Bern	240
	Mr. Kaplan	300
	Mr. Lendrum	397
	Lunch recess	299

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
848	Final Report, Independent Evaluation of the California Tobacco Control Prevention & Education Program.....	196
849	Copy of article on secondhand smoke from the Philip Morris Website.....	290

C E R T I F I C A T E

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Guttenberg http://industrydocuments.ucsf.edu/docs/tsjl0001

I, the undersigned, do hereby certify that I have read the foregoing deposition and that, to the best of my knowledge, said deposition is true and accurate (with the exception of the following changes listed below):

Page	Line	Explanation

BRUCE G. SILVERMAN

SAN DIEGO, CALIFORNIA; FRIDAY, AUGUST 4, 2000
9:10 A.M.

THE VIDEOGRAPHER: This is Volume II in the continuing deposition of Bruce Silverman in re: Tobacco Cases II. Location and appearances are the same as for Volume I. Today is August 4th, 2000. On the record at 9:11 a.m.

BRUCE G. SILVERMAN
having been previously sworn, testifies as follows:

FURTHER EXAMINATION BY MR. RICHARDSON:

Q. Good morning, Mr. Silverman.
A. Good morning.
Q. Is it correct that it took you and Western Initiative Media approximately two weeks to prepare and finalize the 12-month media fund plan?
A. July 2nd to July 14th, yes.
Q. And you've made no changes to that plan since it was submitted to counsel for AESI on or about July 14th, 1999?
A. That's correct.
Q. Where is the expectation that the $106 million that would be necessary to implement the plan is going to come from?
MR. HULBURT: Calls for speculation.
////

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

BY MR. RICHARDSON:
Q. Do you have an expectation as to where the funds to implement the 12-month fund media plan is going to come from, Mr. Silverman? 09:12:38 09:12:41 09:12:45
A. It was my understanding, based on my conversations with Mr. Carrick from Preston Gates & Ellis, that in the event the lawsuit that they were bringing was successful, that the funding of this campaign would be derived from monies provided by the various tobacco companies who were defendants. 09:12:48 09:12:52 09:12:56 09:13:00 09:13:07 09:13:10
Q. Who will administer the plan, if it were to be implemented? 09:13:14 09:13:16
MR. HULBURT: Calls for speculation. 09:13:17
BY MR. RICHARDSON:
Q. Do you know? 09:13:19
A. I don't know. 09:13:19
Q. Over the years haven't there been a lot of media attention focus on the risks associated with ETS that's been widely distributed to the California public? 09:13:33 09:13:38 09:13:42 09:13:45
MR. HULBURT: That's vague and ambiguous as to meaning of the phrase "a lot." What is "a lot"? 09:13:45 09:13:46
BY MR. RICHARDSON:
Q. Are you aware, Mr. Silverman, of media attention that's been focused on the risks associated with ETS as been distributed to the California public? 09:13:51 09:13:56 09:13:58 09:14:03
A. How are you defining "media," the media that's been distributed? 09:14:05 09:14:08

Q. Well, are you aware of media campaigns involving newspaper articles that discussed the risks associated with ETS? 09:14:10 09:14:17 09:14:22
MR. HULBURT: Well, let me interpose an objection; that's vague and ambiguous as to the term "media campaigns involving newspaper articles." Are you asking whether he's seen newspaper articles or whether there are newspaper articles that are part of somebody's media campaign? 09:14:25 09:14:26 09:14:28 09:14:32 09:14:34 09:14:37
BY MR. RICHARDSON:
Q. Do you understand my question? 09:14:39
A. No. I have exactly the same question he does. 09:14:40 09:14:43
Q. Let me rephrase it. Haven't organizations, such as the American Lung Association, directed communications concerning the risks associated with ETS to the California public? 09:14:43 09:14:46 09:14:56 09:15:01
A. Yes. 09:15:06
Q. Okay. Has the American Cancer Society done the same? 09:15:08 09:15:10
A. They may have. 09:15:12
Q. Okay. Are you aware of any other organizations, other than the American Lung Association or the American Cancer Society, who have done that -- which have done that? 09:15:14 09:15:15 09:15:18 09:15:21
A. Does the government count as an organization in this question? 09:15:24 09:15:27

Q. Yes. Any entity. 09:15:28
A. Yes. 09:15:30
Q. Would that -- the government you're referring to be the California DH -- Department of 09:15:30 09:15:32

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://industrydocuments.ucsf.edu/docs/tsjl0001

Health Services? 09:15:34
A. Yes, as well as various county and city 09:15:38
health authorities. 09:15:42
Q. And in your work at Asher and Partners 09:15:44
didn't you help to develop anti-smoking media 09:15:48
campaigns for the Department of Health Services? 09:15:51
A. Yes. 09:15:53
Q. As a part of your effort concerning the 09:15:54
anti-smoking media campaigns, did you create -- or I 09:15:56
should say, develop messages concerning the risks 09:16:03
associated with ETS? 09:16:06
A. Are you asking me as an individual or in my 09:16:09
capacity at that company? 09:16:13
Q. Well, let's start with your capacity at 09:16:15
that company. 09:16:16
A. Yes. 09:16:18
Q. Okay. What did you do in your capacity at 09:16:19
Asher and Partners with respect to getting the 09:16:23
message out to the California public concerning the 09:16:26
risks associated with ETS? 09:16:28
A. Some television and radio advertising, as 09:16:32
well as billboard advertising, was created and 09:16:35
placed. 09:16:37
Q. When was that done? 09:16:38

A. In my situation, in my -- at Asher? 09:16:42
Q. Yes. 09:16:45
A. Between 1994 and 1997. 09:16:46
Q. Okay. Now, directing you to what you have 09:16:49
done personally, aside from your work at Asher, have 09:16:54
you been involved in disseminating information about 09:16:57
the risks associated with ETS to the California 09:17:02
public? And other than your capacity at Asher and 09:17:05
Partners. 09:17:10
A. Personally, no. 09:17:11
Q. Have you been involved in disseminating 09:17:16
information about the risks associated with ETS to 09:17:19
the California public in -- in any other capacity, 09:17:22
other than your work at Asher and Partners? 09:17:25
A. Yes, in my capacity at Initiative Media. 09:17:28
Q. What did you do at Initiative Media with 09:17:32
respect to that? 09:17:34
A. I supervised the -- the work that -- that 09:17:36
Initiative does on behalf of Asher, which is on 09:17:41
behalf of the California Department of Health 09:17:45
Services. 09:17:47
Q. What have you done specifically with 09:17:48
respect to that? 09:17:50
A. I'm sorry, once again, are you asking -- 09:17:55
you -- what is -- please define "you" so I'm clear. 09:17:57
Q. "You" is you. What have you, Mr. 09:18:00
Silverman, done specifically with respect to 09:18:02
disseminating information about the risks associated 09:18:05

with ETS at Western Initiative Media? 09:18:13
A. Personally nothing, other than supervise 09:18:13
the account. 09:18:15
Q. Okay. What -- what account is this, sir? 09:18:16
A. The Department of Health Services account, 09:18:18
which is -- which we do on behalf of Asher and 09:18:22
Partners. 09:18:25
Q. Okay. And this is the work that you 09:18:27
discussed a week ago at a deposition as your -- as a 09:18:29

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://industrydocuments.ucsf.edu/docs/tsjl0001

person most knowledgeable for Western Initiative Media? 09:18:34 09:18:36

A. That's correct. 09:18:36

(Exhibit 848 was marked for identification.)

BY MR. RICHARDSON:

Q. Let me direct your attention to what I'll have now marked as Exhibit 848. It's entitled "Final Report Independent Evaluation of the California Tobacco Control Prevention and Education Program." It has been represented as being an Exhibit 60 to a declaration I believe of Dr. Anderson Johnson. And would you confirm for me that that's a document that you've seen and with which you are familiar. 09:18:38 09:19:16 09:19:22 09:19:25 09:19:28 09:19:31 09:19:38 09:19:42

A. Yes. 09:19:47

Q. In what capacity have you seen that document? 09:19:52 09:19:54

A. I saw this document in my capacity as -- I saw this document as it was provided to me in my 09:19:59 09:20:10

capacity as managing director at Initiative Media, as I recall. I believe that it was issued -- I don't know the date it was issued. But I believe it was issued well after I joined Initiative. I've also reviewed it in preparation for this deposition. 09:20:15 09:20:21 09:20:27 09:20:29 09:20:32

Q. What is the final report? 09:20:37

A. The Department of Health Services uses Prop 99 funds to provide a contract to an evaluation consortium, which analyzes the performance of the statewide media campaign. 09:20:43 09:20:45 09:20:52 09:20:56

Q. Have you read this document thoroughly at some point in time? 09:20:59 09:21:02

A. I've read the document. I don't know how to define "thoroughly." And I've -- and I've read it over a period of years. 09:21:03 09:21:06 09:21:09

Q. Are you familiar with the section that starts at page 40 and runs through page 56? It's Section B entitled "Environmental Tobacco Smoke (ETS)." 09:21:12 09:21:15 09:21:21 09:21:25

A. I have read it. 09:21:31

Q. Is there anything in that section that you've disagreed with -- 09:21:33 09:21:35

MR. HULBURT: Well --

BY MR. RICHARDSON:

Q. -- at any point in time? 09:21:37

MR. HULBURT: Let me object to that; that that's vague and ambiguous and overbroad. Unless you want him to read it, the whole section right now, I 09:21:39 09:21:41 09:21:43

think that's an inappropriate question. 09:21:46

BY MR. RICHARDSON:

Q. Well, do you understand my question, sir? 09:21:47

A. I understand your question. 09:21:50

Q. At any point in time when you reviewed what is Section B on page 40 to 56, did you disagree with -- do you have any recollection of disagreeing with anything that's stated in that section? 09:21:52 09:21:56 09:22:01 09:22:03

MR. HULBURT: Same objection; it calls for speculation. 09:22:05 09:22:06

THE WITNESS: I don't have the -- I wouldn't have the knowledge or expertise to be able to disagree with the information in here. 09:22:17 09:22:17 09:22:20

BY MR. RICHARDSON: 09:22:27

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

Q. Okay. Let me direct your attention to page 43, the very first paragraph. And it reads, "In 1996 community awareness of the dangers of ETS remained extremely high, with 89 percent of adults and 97 percent of tenth grade youth believing that breathing secondhand smoke is bad for your health." Do you see that? 09:22:27 09:22:29 09:22:38 09:22:41 09:22:44 09:22:47 09:22:50

A. Yes. 09:22:50

Q. Do you have any reason to believe today that there's less awareness among adults and tenth graders today? 09:22:51 09:22:53 09:22:59

A. No, I have no reason to believe that. 09:23:04

Q. Having read that, does that influence in any way your opinion concerning the 12-month fund media plan that you developed for your expert work in this case? 09:23:06 09:23:12

09:23:18 09:23:22

A. No. 09:23:22

Q. Having read that, does that affect in any way the opinions that you intend to offer -- well, let me strike that. 09:23:25 09:23:27 09:23:32

Does that affect in any way the opinions you're offering in this case? 09:23:33 09:23:35

A. No. 09:23:37

Q. Let me direct you to page 48. And, again, the first statement which reads, "Statewide ads increased adults' and tenth graders' already high level of awareness of the dangers of secondhand smoke and ETS policies." Do you see that? 09:23:51 09:23:55 09:23:59 09:24:03 09:24:06

A. I'm sorry, no. Which -- 09:24:08

Q. Page -- 09:24:09

A. On 48, right here? 09:24:09

Q. Page 48 at the very top. 09:24:11

A. Okay, I got it. Yeah. 09:24:13

Q. Okay. Is there anything you disagree about that statement? 09:24:15 09:24:18

A. I would have no reason to disagree. 09:24:19

Q. Does that statement affect the opinion that you're offering in this case -- 09:24:36 09:24:40

A. No. 09:24:45

Q. -- in any way? 09:24:45

Let me direct you to page 50. And, again, it's the very first full statement. It reads, 09:24:55 09:24:59

"Three-quarters of the local tobacco control programs reported that they had worked to increase the number of families with smoke-free homes and vehicles in 1996. Over the years these efforts appear to have paid off." Do you see that? 09:25:02 09:25:04 09:25:06 09:25:12 09:25:14

A. Yes. 09:25:16

Q. Is there anything about those two statements that you disagree with? 09:25:17 09:25:19

A. No. 09:25:22

Q. Is there anything about those two statements that affect the opinions that you're offering in this case? 09:25:25 09:25:27 09:25:30

A. The -- 09:25:35

Q. Just yes, no? 09:25:38

A. No. 09:25:41

Q. Let me direct you further to page 53. The statement -- the second full statement, it reads, "Adults and opinion leaders who are exposed to ETS focused advertisements were more likely to have no 09:26:19 09:26:28 09:26:30 09:26:34

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Legacy Industry Documents Library - https://www.industrydocuments.ucsf.edu/docs/tsjl0001

smoking policies in their homes." Do you see that? 09:26:36
A. Yes. 09:26:44
Q. Is there anything about that statement with which you disagree? 09:26:44
A. No. 09:26:44
Q. And does that statement affect in any way the opinions that you're offering in this case? 09:26:44
A. It supports it. 09:26:48
Q. Let me direct you, again, sir, to what has been marked as Exhibit 845. The campaign budget of $106 million for the -- for the 12-month fund media plan, does that amount include an analysis of any discounts that might be obtained through negotiations for media buys? 09:26:50

200

A. You're asking if it includes a discussion? 09:27:01
Q. Discounts. 09:27:24
A. Discounts? 09:27:30
Q. Yes. 09:27:40
A. The rates quoted -- the rates quoted in the -- in the breakdown in the pages at the back of the plan are all based on what are called planning rates, where planning -- where those rates are available. Meaning there are some media forms that do not discount at all and others that do. Those that do, we indicate it based on -- on what we anticipated negotiate rates -- negotiated rates to be, with a certain amount of pad to allow us to really push it harder. So the answer would be yes. I think yes. 09:27:44
Q. If you have multiple placements of ads, is it typical to expect that there may be discounts as a result of the multiple placements? 09:27:51
A. Multiple placements in a given -- given media form, given publication or station? 09:27:53
Q. Yes, sir. 09:27:55
A. Yes. 09:27:55
Q. Okay. Has that been taken into account with respect to the $106 million? 09:27:56

201

A. Partially. 09:28:02
Q. When you say "partially," what do you mean? 09:28:06
A. You can't predict with any accuracy exactly what you might pay in a negotiated environment. So, as I just stated, the plan anticipates discounts, and it is planned based on receiving some discounts. It is anticipated that when you negotiate it, there would be further discounts. 09:28:12
Q. Okay. Let me ask a follow-up question with respect to Exhibit 848. And, again, direct you to page 53. How does the statement "Adults and opinion leaders who are exposed to ETS-focused advertisements were more likely to have no smoking policies in their homes" support the opinions that you're offering in this case? 09:28:15
A. What this means to me is that if you have a focused campaign on ETS, with the right messages, that you will increase -- that this indicates that consumers are responsive to that sort of advertising. And, therefore, you can achieve the stated goal of the media plan, which is to affect consumer behavior as regards smoking in the presence of others. If this -- if the -- if the absolute numbers were showing that 100 percent of all people in the state 09:28:19

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

of California had smoking bans in their homes, that would change my views. But as long as there is a substantial number of people who don't have smoking bans in their homes, this, to me, says that there is 09:31:01 09:31:04 09:31:08 09:31:12

202

opportunity to improve the percentage of people who do via the use of advertising. 09:31:16 09:31:19

Q. Let me direct your attention to Figure 23 do you see that, on page 53? 09:31:26 09:31:29

A. Yes. 09:31:31

Q. It's a chart that appears to indicate the percent of adults and tenth graders who recalled ETS ads who had asked someone to not smoke by exposure to ETS ads. And it has "1996" in paren. Do you see that? 09:31:32 09:31:34 09:31:39 09:31:43 09:31:48

A. Yes, I do. 09:31:48

Q. Okay. Do you have an understanding of what percentage of adults and tenth graders who recalled such ads had asked someone not to smoke as reflected in the chart? 09:31:49 09:31:50 09:31:55 09:31:58

A. I believe I understand the chart. 09:31:58

Q. Okay. What percentage of adults is reflected there? 09:32:00 09:32:02

A. Well, if they had not seen any ads -- if they had not seen any ads, 38 percent. If they had seen more than two ads, 48 percent. 09:32:08 09:32:14 09:32:17

Q. Do you have any reason to believe that those numbers would be lower today, those percentages? 09:32:21 09:32:22 09:32:24

A. I have no idea. 09:32:26

Q. Do you have any reason to believe that they would be lower? 09:32:27 09:32:27

A. I have -- I don't. I have no reason to 09:32:30

203

believe that. 09:32:32

Q. Do you have any reason to believe that they would be higher? 09:32:38 09:32:39

A. I can't say that, without seeing reports. 09:32:42

Q. Have you done any research to investigate that point? 09:32:56 09:32:58

A. No. 09:33:00

Q. Have you been retained as an expert in any other cases? 09:33:04 09:33:07

A. In any other cases at all? 09:33:10

Q. At all. 09:33:13

A. I'm sorry. Once or twice. 09:33:16

Q. Okay. When was -- before this case, when was the last time you were retained as an expert? 09:33:19 09:33:20

A. Oh, I would say it was about five years ago. 09:33:28 09:33:32

Q. And what area of expertise? 09:33:32

A. Advertising. 09:33:35

Q. Were you retained for a -- for litigation? 09:33:37

A. Yes. 09:33:40

Q. Okay.

A. Well, it was -- it was -- it was something that was being settled in arbitration. So I suppose it started as a litigation case. 09:33:40 09:33:45 09:33:48

Q. Had that -- has that matter been resolved? 09:33:50

A. Yes. 09:33:53

Q. Who -- who were the parties involved? 09:33:54

A. It was a case involving an advertiser who 09:33:59

204

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

was suing an advertising agency for breach of contract, because the advertiser was claiming that the advertising agency did not perform the contract as -- as he understood it. 09:34:08 09:34:10 09:34:14 09:34:19

Q. What were you retained to do? 09:34:23

A. I was retained by the plaintiff as an expert on what advertising agencies are supposed to do. 09:34:28 09:34:30 09:34:32

Q. Okay. You mentioned one other occasion. What was that? 09:34:33 09:34:36

A. It was another advertising case. 09:34:37

Q. How long ago? 09:34:39

A. It's within the last ten years, but I don't recall. I know it's more than five years ago. 09:34:41 09:34:44

Q. Who were the -- was that litigation, as well? 09:34:46 09:34:48

A. That was, yes. 09:34:49

Q. Who were the parties involved? 09:34:50

A. The party there was an advertiser and a -- and a magazine. And the magazine -- I was working for the -- the advertiser, and he was alleging breach of contract with the magazine because of the way they ran, or didn't run, his schedule. 09:34:52 09:34:55 09:35:00 09:35:07 09:35:11

Q. What were you retained to do? 09:35:13

A. To provide -- provide expertise on the media practices of magazines as regards advertising. 09:35:16 09:35:20

Q. Have you been retained as an expert with respect to any ETS-related issues prior to your retention in this case? 09:35:25 09:35:27 09:35:30

A. No -- excuse me, let me just make sure I understand your question. You're asking in legal matters? 09:35:32 09:35:40 09:35:43

Q. Yes. 09:35:43

A. The answer is no. 09:35:44

Q. Were you thinking of your consultant work with the state of Florida? 09:35:46 09:35:49

A. I was thinking of, you know, in general, I've, you know, been involved -- the nature of my business is that it's consultive. Therefore, in any place where I've been involved with -- involved with this issue, I have provided consulting services. 09:35:52 09:35:54 09:35:57 09:36:03 09:36:08

Q. Other than the consulting services we discussed yesterday concerning the state of Florida, have you provided consulting services outside of California for any other party or entity? 09:36:12 09:36:13 09:36:18 09:36:19

A. Yes. 09:36:25

Q. What party or entity? 09:36:26

A. I provided consulting services to the Centers for Disease Control. In my capacity at Asher, provided services to the county -- health department of the County of Los Angeles. I provided consult -- services to the Department of Health of the state of Oregon. And I've provided consulting services to advertising agencies working on behalf of -- of tobacco use prevention campaigns in Arizona. And I've -- I have advised advertising agencies that were seeking similar account assignments in Texas, as well as agencies that were seeking to get the American Legacy Foundation tobacco use prevention campaign. 09:36:29 09:36:36 09:36:44 09:36:48 09:36:52 09:36:55 09:37:01 09:37:09 09:37:17 09:37:21 09:37:27 09:37:31 09:37:34

Q. What is the "American Legacy Foundation 09:37:38

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Stanford Libraries industrydocuments.ucsf.edu/docs/tsjl0001

tobacco use prevention campaign"? 09:37:39
A. The American Legacy Foundation is the 09:37:42
national advertising and public relations campaign 09:37:44
mounted by a foundation that was established by the 09:37:49
National Association of Attorney Generals, and it is 09:37:52
funded by the master settlement -- by funds provided 09:37:55
via the master settlement agreement. 09:38:01
Q. With each of the entities and parties you 09:38:05
just listed, were you doing consultive work 09:38:11
concerning risks associated with ETS? 09:38:15
A. I wouldn't say that. 09:38:20
Q. Okay. Which of those, if any, were you 09:38:22
doing consulting work with respect to risks 09:38:23
associated with exposure to ETS? 09:38:27
A. ETS -- information regarding ETS was a 09:38:38
small component of the advice I gave to the 09:38:43
advertising agencies seeking the American Legacy 09:38:47
Foundation campaign. ETS was a component of the 09:38:51
advice I've given to CDC. ETS -- I would say that 09:38:57
ETS was a -- a relatively small component of -- of 09:39:15
the information advice that I provided to -- to 09:39:22
anyone who asked my thoughts and opinions about how 09:39:26
to mount tobacco use prevention advertising 09:39:30

campaigns. 09:39:33
Q. Did you provide any information or advice 09:39:36
with respect to ETS to any of the parties you've 09:39:38
listed that's -- that was inconsistent with the 09:39:47
opinions that you're offering in this case? 09:39:51
A. No. 09:39:53
MR. RICHARDSON: I have no further 09:39:58
questions at this point, and would open the floor to 09:39:58
the other parties who might. 09:40:05
MS. SHERIDAN: I have just a few follow-up 09:40:07
questions, and then I know some of the other lawyers 09:40:10
would like to go into different areas. 09:40:11
THE VIDEOGRAPHER: Do you need a 09:40:13
microphone? 09:40:14
MR. RICHARDSON: Yeah. Can we just -- 09:40:15
MS. SHERIDAN: Can you not hear me? Okay.
MR. RICHARDSON: -- hand you -- 09:40:17
MS. SHERIDAN: I could just sit here.
THE VIDEOGRAPHER: That's fine.
MS. SHERIDAN: Usually soft-spoken is not a 09:40:21
description that's used in connection with me, but 09:40:26
I'm happy to --

EXAMINATION BY MS. SHERIDAN:
Q. Okay. Some of the questions I'm going to 09:40:28
ask you may sound like I'm jumping around because I 09:40:30
just took these from my notes from yesterday. So I 09:40:33
just tell you that in advance so you're not confused 09:40:35

if I go from one topic and following your answer to 09:40:37
an entirely different topic, okay? 09:40:39
You mentioned yesterday that -- that you 09:40:42
knew of Andy Johnson apart from this case; is that 09:40:45
correct? 09:40:48
A. Yes. 09:40:48
Q. Okay. And how do you know Andy Johnson? 09:40:50
A. Andy was part of the team that did the 09:40:54
evaluations for the California Department of Health 09:40:57
Services as a -- we attended some meetings together 09:41:02

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/tsjl0001

as part -- they had meetings -- the Department of Health Services typically had meetings that involved all of their subcontract -- all of their contractors so that people would be on the same page. It's -- there's hardly any point in evaluating something if the people who are supposed to do the job don't know what they're being evaluated on. 09:41:08 09:41:12 09:41:21 09:41:21 09:41:21 09:41:24 09:41:27

Q. So it was in connection with Andy Johnson's work evaluating the Prop 99 campaign that you became acquainted with him? 09:41:29 09:41:32 09:41:36

A. Yeah. I -- I would truly use the word, you know, acquainted. I don't know him well. I probably met him two or three times. 09:41:37 09:41:40 09:41:42

Q. Okay. Do you know whether or not he was retained as an expert in this case before you were? 09:41:44 09:41:45

A. I have no idea. 09:41:48

Q. Other than the two discussions that you referenced yesterday that have occurred recently with 09:41:50 09:41:51

the lawyers in the case, and yourself, and Andy Johnson, and Lynne Doll have you had any other discussions with Andy Johnson about your opinions in the case? 09:41:55 09:41:59 09:42:03 09:42:06

A. No. 09:42:07

Q. You also indicated yesterday that you had been provided with a copy of his deposition, which you had reviewed; is that right? 09:42:07 09:42:09 09:42:10

A. Yes. 09:42:13

Q. And that was done recently? 09:42:13

A. Yes. 09:42:15

Q. And I think yesterday you indicated that you wanted to review his deposition because the media plan that you, in part, created was partially based on the experience of the California program regarding the effectiveness of the program; is that correct? 09:42:15 09:42:17 09:42:20 09:42:24 09:42:27

A. Correct. 09:42:30

Q. Yet you -- you developed the media plan before reviewing Andy Johnson's testimony, correct? 09:42:31 09:42:33

A. Oh, yeah. 09:42:37

Q. What do you recall, as you sit here today, from Andy Johnson's testimony at his deposition that you believe supports your expert opinions in this case? 09:42:40 09:42:42 09:42:46 09:42:50

A. I don't recall. 09:42:50

MR. HULBURT: Let me just object; that's overbroad. The deposition is two volumes over two days. I mean, that question is impossible for him to 09:42:51 09:42:53 09:42:55

answer without going back to read the deposition. 09:42:58

BY MS. SHERIDAN:

Q. When was the last time you reviewed the deposition? 09:43:01 09:43:02

A. The first and only time I reviewed it was last Saturday. 09:43:04 09:43:06

Q. Okay. And did you review it all in one sitting? 09:43:08 09:43:10

A. I scanned through it. 09:43:11

Q. Did you take notes from your review of his deposition? 09:43:14 09:43:16

A. No. 09:43:17

Q. Did you highlight the transcript? 09:43:17

A. No. 09:43:19

Q. Do you, as you sit here today, have any 09:43:22

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the UCSF Industry Documents Library. industrydocuments.ucsf.edu/docs/tsjl0001

recollection as to anything that Andy Johnson describes regarding a program that he opines needs to be conducted in California? 09:43:24 09:43:29 09:43:32

A. No. 09:43:34

Q. Do you know if anywhere in Andy Johnson's deposition he states that one of the focuses of any program he thinks should be done should be to encourage smokers to smoke away from nonsmokers? 09:43:37 09:43:41 09:43:46 09:43:49

A. I don't know that. 09:43:53

Q. Okay. So you don't know if that's anywhere in his deposition? 09:43:53 09:43:57

A. As I said, I scanned it. I don't recall reading that. 09:44:00 09:44:01

Q. Did you speak with any of the lawyers representing the plaintiff in this case about your review of Andy Johnson's deposition? 09:44:03 09:44:05 09:44:07

A. No. 09:44:10

Q. Do you have any opinions as to the effect on people's behavior in California as a result of legislation that's been passed that severely restricts smoking in public places? 09:44:24 09:44:28 09:44:32 09:44:35

A. Could you repeat that question, please. 09:44:40

Q. Sure. Do you have any opinions as to the effect on people's behavior in California as a result of legislation that's been passed that severely restricts smoking in public places? 09:44:42 09:44:43 09:44:45 09:44:48

A. Yes. 09:44:51

Q. What's your opinion? 09:44:51

A. My opinion is that the smoke-free workplace laws has had the effect of reducing the use of tobacco products, and that -- overall, that it's played a fairly significant role in achieving the original goals of Proposition 99, which is to reduce the prevalence of smoking. 09:44:53 09:44:55 09:44:58 09:45:04 09:45:09 09:45:12

Q. Okay. So that's as far as workplace restrictions. What about restrictions in restaurants and bars, do you have an opinion as to whether or not that has also effected the public's behavior about smoking in public places? 09:45:14 09:45:16 09:45:20 09:45:22 09:45:26

MR. HULBURT: Is your question suggesting that those are not workplace restrictions? Is that something other than the question you asked before? 09:45:29 09:45:30 09:45:33

BY MS. SHERIDAN:

Q. Well, let me -- let me clarify. When you were talking about the workplace restrictions, were you incorporating within that the smoking in restaurants and bars? 09:45:36 09:45:37 09:45:38 09:45:42

A. I was. That's all -- 09:45:42

Q. Okay.

A. It's all the same thing to me. 09:45:43

Q. Do you have an opinion as to whether or not, as a result of those legislated restrictions, that has also affected people's behavior when they're in their homes as to smoking around others? 09:45:45 09:45:46 09:45:52 09:45:55

A. I don't have an opinion on that. 09:46:00

Q. Have you reviewed any reports regarding that issue? 09:46:01 09:46:03

A. No. 09:46:04

Q. You said several times yesterday, when you were being asked about Prop 99, that secondhand smoke was never really a discrete objective in the 09:46:08 09:46:11 09:46:15

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf Stanford Library https://industrydocuments.ucsf.edu/docs/tsjl0001

California tobacco use prevention program; is that correct? 09:46:18 09:46:21

A. What I said is that it was a strategy. 09:46:23

Q. Okay. I believe -- I wrote that directly down from the transcript at page 72. Is that not correct, the words that I just used? 09:46:26 09:46:29 09:46:32

A. It probably is correct if you wrote it down. 09:46:34 09:46:36

Q. Okay. Well, do you agree, is that your opinion, that secondhand smoke was never really a discrete objective in California's tobacco use prevention program? 09:46:36 09:46:39 09:46:47 09:46:47

A. Secondhand smoke, as we've been -- the secondhand smoke objective that we've been discussing, which is to get people to smoke away from other people, has never been an objective, to my knowledge, of the California program. 09:46:47 09:46:49 09:46:52 09:46:57 09:47:03

Q. Okay. Well, let's talk a little bit more specifically about your knowledge of the California program. Do you have any information regarding how much of Prop 99 funds, if any, were spent exclusively on ads for ETS? 09:47:05 09:47:08 09:47:08 09:47:12 09:47:16

A. I -- I -- I don't have that information, no. 09:47:19 09:47:22

Q. You made reference yesterday to certain ETS ads that I believe your -- your previous company may have been responsible for. One of them was "Victim Wife"? 09:47:26 09:47:32 09:47:34 09:47:36

A. Correct. 09:47:37

Q. And another one was the billboard "Smoke Doesn't Know How to Stay in the Nonsmoking Area" -- or "in the Smoking Area." Are those ETS ads? 09:47:37 09:47:40 09:47:43

A. They're ads that focus on ETS, yes. 09:47:47

Q. Okay. Have you seen the billboard that has a couple on it, and the -- the man is holding a cigarette, and it says "Mind if I smoke?" and the 09:47:50 09:47:53 09:47:56

woman responds "Care if I die?" 09:47:59

A. Yes. 09:48:02

Q. Was that one that was done by Asher? 09:48:02

A. Yes. 09:48:05

Q. And is that an ETS ad? 09:48:05

A. Yes. 09:48:07

Q. Do you consider the three ads I've just referred to, the "Mind if I smoke? Care if I die?" "Victim Wife" and "Smoke Doesn't Know How to Stay in the Smoking Section" ads to be effective ETS ads? 09:48:09 09:48:13 09:48:14 09:48:17

A. I believe they're effective, yes. 09:48:21

Q. And those were funded through Prop 99 money? 09:48:23 09:48:26

A. Yes. 09:48:27

Q. And when you say you believe them to be effective ads, is that -- if I may extrapolate a little bit from your testimony yesterday -- is that because you believe those ads are designed to change people's behavior about smoking around others? 09:48:27 09:48:28 09:48:32 09:48:35 09:48:37

A. I -- I believe those ads function as part of the overall campaign. It's a component in contributing to reducing the prevalence of smoking. Do they affect people -- do they contribute to people not smoking around others, yes, I believe that to be true. 09:48:41 09:48:44 09:48:51 09:48:55 09:49:00 09:49:03

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Support provided by the Industry Documents Library: industrydocuments.ucsf.edu/docs/tsjl0001

Q. Were you involved in any of the design of those three ads that we're referencing here? 09:49:03 09:49:05
A. All three. 09:49:09

215

Q. Okay. Well, was your intent in being involved in the design of those ads to change people's behavior about smoking around others? 09:49:10 09:49:13 09:49:14
A. Actually, no. 09:49:17
Q. What was your intent? 09:49:19
A. The intent was simply to -- to reduce the prevalence of smoking overall. It's -- we were not trying -- we were not sitting there and looking at these ads and saying, "These ads will get people to not smoke around other people." You know, it has that effect, but that wasn't our objective in creating -- and I believe it would have that effect, but that wasn't our intent when we were creating that advertising. 09:49:20 09:49:23 09:49:30 09:49:33 09:49:37 09:49:39 09:49:42 09:49:44 09:49:48
Q. Wasn't having the effect really the bottom line, from what you said yesterday, of changing the behavior, is what you're looking at? 09:49:49 09:49:52 09:49:55
A. Well, yeah, but the behavior is a -- is a broader behavior. It's the -- we really would hope that they would encourage people to not smoke at all. 09:49:55 09:49:57 09:49:59
Q. Have you seen any figures as to whether or not those ETS type of ads have had any impact in California on reducing smoking in general? 09:50:03 09:50:07 09:50:11
A. I'm not sure that I've been able to identify how individual ads have had an effect on smoking. If I take the -- the program as a whole, it appears that the program, as a whole, has had a very significant effect in California. 09:50:19 09:50:21 09:50:26 09:50:32 09:50:35

216

Q. Okay. Have you seen any efficacy studies on any of the ads that -- that Asher has done in connection with the Prop 99 program? 09:50:37 09:50:41 09:50:44
A. I've certainly seen and been part of qualitative studies on individual ads generally that are done prior to production. 09:50:48 09:50:51 09:50:54
Q. And do they do studies post-production, as well, to see how well they're received and recalled? 09:50:58 09:51:00
A. They may. 09:51:09
Q. Okay. Because by the time you left Asher, Asher was still the contractor for the state to do advertising on the Prop 99 program, correct? 09:51:12 09:51:14 09:51:18
A. Yes. 09:51:21
Q. So you no longer had a direct oversight on the -- as to the design and implementation of the ads through Prop 99, correct? 09:51:21 09:51:23 09:51:27
A. That's correct. 09:51:29
Q. When did you leave Asher, again? 09:51:29
A. In 1997. 09:51:31
Q. Okay. You -- you were talking about the three ads we were just talking about, and you said that the -- in designing those ads, your focus was not on getting people to not smoke around others, even though that may have been the end result, correct? 09:51:35 09:51:47 09:51:51 09:51:57 09:52:00 09:52:02
A. That's correct. 09:52:03
Q. I noted in your 12-month media plan that, as Mr. Richardson established earlier today, was 09:52:04 09:52:08

217

created in -- in two weeks, that there is no copy in 09:52:10

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

that -- that package of any creative messaging, and that would need to be something that would need to be created, correct, before anything could be done on this program? 09:52:14 09:52:19 09:52:21 09:52:24

A. Yes. 09:52:25

Q. Okay.

A. Yes. 09:52:27

Q. Do you have any ideas, as you sit here, as to the type of messages you would recommend to anyone implementing these programs that would specifically motivate people to not smoke around others? 09:52:28 09:52:30 09:52:32 09:52:41

A. The only -- the only ideas I would have at this point would be to utilize existing ETS messages from various advertising campaigns that have been done around the United States. They would have to be researched for appropriateness in the state of California. They would have to be researched to see if they create the desired result. I really haven't given any thought to what creative messaging would be on this -- on a going forward campaign. It has never been my assignment, nor is it now something I do. 09:52:41 09:52:43 09:52:47 09:52:50 09:52:54 09:52:57 09:52:59 09:53:03 09:53:07 09:53:10

Q. Okay. How long do you think the creative messaging part of this program would take? 09:53:14 09:53:17

A. To be developed? 09:53:20

Q. Right. 09:53:21

A. A lot more than two weeks. 09:53:23

Q. Do you have an estimate? 09:53:25

A. I think it could be done in 90 days. 09:53:29

Q. You just made reference to looking at ad campaigns in other states. Do you have in your mind, as you sit here today, ads in other states that are directly focused on ETS, and in your mind are focused on trying to change people's behavior about smoking around others? 09:53:36 09:53:39 09:53:42 09:53:44 09:53:49 09:53:52

A. Are you asking if I know specific ads? 09:53:53

Q. Right. 09:53:57

A. I don't know specific ads. 09:53:57

Q. Do you have a general idea of any states that are doing such ads? 09:53:58 09:54:00

A. I know Massachusetts does such ads. I believe Florida does such ads. There may be ads on that subject coming out of other -- out of other tobacco use prevention campaigns in other states. There are now a lot of them, and I haven't seen all of them. 09:54:03 09:54:07 09:54:11 09:54:14 09:54:18 09:54:20

Q. Do you, as you sit here today, have an understanding of where California ranks in the country as far as both the prevalence of smoking and the percentage of smokers who smoke around others? 09:54:22 09:54:24 09:54:27 09:54:29

A. Yes, I have some information on that. 09:54:34

Q. Okay. And what's your information? 09:54:36

A. I believe that California is in overall prevalence rate second. I believe Utah is somewhat lower. When I say "second," meaning in lowest. 09:54:39 09:54:43 09:54:46

Q. Right. 09:54:55

A. And my understanding is that about 64 percent of the population doesn't smoke around others. I believe that's the number. 09:54:56 09:55:04 09:55:10

Q. In California? 09:55:11

A. I could be wrong. In California. I don't know how that compares to other states. 09:55:13 09:55:15

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the Industry Documents Library: industrydocuments.ucsf.edu/docs/tsjl0001

Q. Do you have a percentage for California as to smoking prevalence? 09:55:17 09:55:18
A. If I recall correctly -- and I'm just trying to recall. The adult -- all adults I believe is about 16-1/2 percent prevalence rate, is the most recent numbers. Kid percentage rates I believe are somewhat lower than that. 18-to-24 prevalence rates are higher than that, and climbing. 09:55:25 09:55:30 09:55:37 09:55:41 09:55:52 09:55:58
Q. Higher than 16-1/2 percent? 09:56:01
A. Higher than 16-1/2, and continuing to increase. 09:56:04 09:56:05
Q. Okay. Now, out of all these figures you've just quoted me, are you getting these all from the same source, or are you taking these from different sources? 09:56:07 09:56:09 09:56:12 09:56:15
A. I'm -- I'm getting this from the most recent numbers that were published by the Department of Health Services, and I read them somewhere along the line in, you know, recent weeks. 09:56:17 09:56:22 09:56:30 09:56:31
Q. Okay. Do you know when those numbers were published? 09:56:36 09:56:38
A. They were published sometime this year, based on research done I believe in January. 09:56:42 09:56:44

Q. Okay. And did you print out any documents that you looked at regarding these numbers that you believe were published by the Department of Health Services this year? 09:56:50 09:56:54 09:56:57 09:56:59
A. No, I didn't print them out. 09:57:00
Q. Did you look at them online? 09:57:02
A. Yeah, I looked on the DHS Website. 09:57:04
Q. Okay. And you know that yesterday Mr. Richardson made reference to an article that just came out a couple of weeks ago regarding Governor Davis announcing the plummeting rate of youth smoking in California? 09:57:07 09:57:10 09:57:13 09:57:16 09:57:23
A. Yes. 09:57:24
Q. Okay. Have you, since yesterday, attempted to look fully at the California Department of Health Services report that this article references? 09:57:24 09:57:31 09:57:34
A. No. 09:57:35
Q. Would you agree that this article has more up-to-date percentage information than the information you may have looked at several weeks ago? 09:57:38 09:57:40 09:57:42
MR. HULBURT: That calls for speculation. It lacks foundation. 09:57:45 09:57:46
BY MS. SHERIDAN:
Q. You can still answer. 09:57:48
A. I don't know. I don't know whether or not the numbers I saw aren't those numbers. 09:57:50 09:57:52
Q. Okay. You recall from yesterday we pointed out in this article that it suggests that -- or it states that, "Adult smokers in California are voluntarily banning smoking in their homes at rates nearly four times the national average." 09:57:55 09:57:59 09:58:02 09:58:05 09:58:07
A. That's -- I read it. 09:58:11
Q. When you were looking at figures several weeks ago, do you remember seeing any figures about adult smokers voluntarily banning smoking from their homes? 09:58:13 09:58:15 09:58:17 09:58:20
A. No, I don't remember that. 09:58:21
Q. Okay. Several times yesterday you threw 09:58:23

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the Tobacco Industry Documents Library at industrydocuments.ucsf.edu/docs/tsjl0001

around some percentages, and I'm just somewhat curious about where you got them from. Yesterday you said that in your opinion 40 to 50 percent of smokers in California still smoke around others. Do you know where you get that figure from? 09:58:27 09:58:29 09:58:32 09:58:35 09:58:39

A. I don't recall. 09:58:40

Q. Is that -- is that information you've had in your mind for a while and you believe that to be the case, or is that something you read recently? 09:58:44 09:58:47 09:58:49

A. I believe it's something I read recently. 09:58:52

Q. Okay. Do you recall, when you got that percentage number, if it broke down whether those smokers were smoking inside or outside of the home? 09:59:00 09:59:00 09:59:03

A. I don't remember. 09:59:06

Q. And I think you said yesterday you don't know what the national average is as far as people voluntarily banning smoking in their homes as compared to California? 09:59:11 09:59:13 09:59:15

09:59:18

A. Don't know. 09:59:19

Q. I -- I noted in the -- the materials that were produced by the lawyers that are defending you here, that there were a lot of things copied off of Internet sites, articles and so forth, all done around the July 1999 timeframe when the media plan was being put together. Have you looked at any of those materials? 09:59:27 09:59:29 09:59:36 09:59:39 09:59:42 09:59:45 09:59:48

A. I've looked at them. Is that July 1999? 09:59:53

Q. Yeah. 09:59:56

A. I've looked at them. 09:59:57

Q. Okay. The only materials that I saw that looked like research materials like I'm referencing were from July of 1999. My question is, have you done any follow-up research since July of last year? 09:59:59 10:00:01 10:00:04 10:00:07

A. No -- well, I'm sorry. Other than looking at the DHS Website recently, and that's about it. 10:00:10 10:00:16

Q. Okay. Is it fair to say that the -- the 12-month media plan that you have there relies on some of Dr. Johnson's opinions as stated -- I should restate that. 10:00:25 10:00:28 10:00:32 10:00:39

I note that in the 12-month media plan there are several footnotes to the facts that are cited in there, and you cite back to the USC report, in which Dr. Johnson was one of the contributors. Is it fair to say that that report is relied on heavily in the 12-month media plan? 10:00:41 10:00:43 10:00:48 10:00:51 10:00:53 10:00:58

10:00:59

MR. HULBURT: Let me object to the phrase "heavily" as vague and ambiguous. Calls for speculation as to what you mean by that. 10:01:00 10:01:02

BY MS. SHERIDAN:

Q. Would you agree that that report is cited as supporting authority throughout the 12-month plan? 10:01:05 10:01:07

A. Yes. 10:01:10

Q. If I were to tell you hypothetically that in fact ETS was considered a primary focus of the DHS in spending Prop 99 funds, is it your opinion, as an advertising expert, that those ads should have been designed to motivate people to change their behavior as far as smoking around others in order to reduce exposure to ETS? 10:01:27 10:01:28 10:01:34 10:01:37 10:01:40 10:01:44 10:01:47

A. I don't know how to respond to that. Could you possibly -- 10:01:57 10:02:02

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Support provided by the Industry Documents Library: http://industrydocuments.ucsf.edu/docs/tsjl0001

Q. Sure. 10:02:04
A. -- restate that question in some other way? 10:02:04
Q. You -- 10:02:09
MR. MILES: Why -- why don't you read it back to him. 10:02:09
MS. SHERIDAN: Okay.
MR. MILES: Have the court reporter read it back to him. 10:02:11
(Record read.) 10:02:12
THE WITNESS: I'm not sure how those ads would be changed to achieve that specific objective. You know, what you're doing in your hypothetical 10:02:38

situation is narrowing the objective of the advertising. And I suppose that if all you were trying to achieve is to get people to not smoke around others, I don't think it's a matter so much of changing the -- those individual creative executions as much as it would be on how often you ran those creative executions, and how they ran, if at all, as part of a mix of other creative messages that were not on the ETS -- that were not discussing ETS. 10:02:40
BY MS. SHERIDAN:
Q. So, in other words, like, for example, the three ads that we discussed earlier, the ETS ads, is what you're saying then that it may be appropriate to use the same copy that's in those ads but just to run it more frequently? 10:03:35
A. Could be, yes. Yes. 10:03:53
Q. Because, as you sit here today, you don't have any opinion as to creative messaging that should be appropriate in order to change behavior regarding ETS? 10:03:56
A. Yeah, I have -- have some opinions. 10:04:06
Q. Okay. Why don't you tell us -- tell us what those are. 10:04:09
A. Well, I -- I personally, as an advertising person, I believe that advertising can be quite overt in asking people to do things, especially if there are rational or -- and/or very strong emotional reasons to do so. To the best of my knowledge, with 10:04:14

the exception of "Mind if I smoke? Care if I die?" I don't think I've ever seen creative executions in the framework of tobacco use prevention that has literally tried to get people -- instruct people to suggest ways or ideas on how to ask other people to not smoke -- there's a bug flying around -- not smoke around them. And I personally believe that that can be done and probably should be attempted. So that you would have more overt kind of messaging in that regard. 10:04:32
Q. And is it your opinion that that type of advertising is not being done now? 10:05:16
A. Yes. 10:05:19
Q. Have you seen the ad that's currently running that takes place in a bar, and there's a man that's smoking a cigarette, and a woman starts to look towards him, and there's a flirtation that goes on? And she signals for him to follow her, and she leads him to the back of the bar and opens the door, and he goes through it, and she slams it. And at the end of the ad it says, "Make sure" -- you know, 10:05:21

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 https://www.industrydocuments.ucsf.edu/docs/tsjl0001

"There's no smoking allowed in places. Stay in the -- stay outside if you want to smoke." Have you seen that ad? 10:05:50 10:05:50 10:05:50

A. Yes, I've seen that. 10:05:55

Q. Wouldn't that fall into the category you've just described? 10:05:55 10:05:56

A. I don't think it's a good ad. 10:05:56

Q. Why do you not think it's a good ad? 10:05:57

A. It sort of demonizes the smoker, and I don't believe that's a very good idea. I don't believe it's -- I happen to believe it's actually repugnant. People smoke. The fact that people smoke does not make them evil. The fact that people smoke does not mean they should be treated foolishly, or tricked, or demonized, or thrown out of places. I think they should be treated respectfully and responsively. So I happen to not think it's a very good ad. 10:06:00 10:06:02 10:06:04 10:06:07 10:06:10 10:06:14 10:06:18 10:06:21 10:06:24 10:06:29

That's my personal opinion. I've not seen any research on it. I just don't think it's a very good ad. I don't think that that is an ad that would lead people -- personally I don't believe it would lead people to turn to others and say "Please don't smoke around me" as much as it is clearly making a statement that smoking in bars is illegal. But I happen to not think -- I happen to think it's not a very good piece of advertising. 10:06:29 10:06:33 10:06:36 10:06:40 10:06:42 10:06:46 10:06:51 10:06:57 10:06:58

Q. Yet you would agree with me that that is an example of advertising that shows people ways of dealing with smoking around them? 10:07:00 10:07:02 10:07:05

A. Sure, I'll agree with that. Pretty terrible way. 10:07:06 10:07:09

Q. Are you familiar with Proposition 10? 10:07:10

A. Yes. 10:07:12

Q. What is Proposition 10? 10:07:13

A. Proposition 10 was a ballot measure that -- a California ballot measure that imposed the tax on cigarettes to fund early childhood education, as well as funding a tobacco use prevention campaign that specifically focused -- as I understand it, specifically focused on smoking in and around -- smoking near children. 10:07:15 10:07:22 10:07:28 10:07:30 10:07:36 10:07:39 10:07:43

Q. Okay. Yesterday you -- you stated that kids were under-marketed in this area as far as tobacco use prevention. Is it your understanding that Prop 10 is designed to deal with that issue? 10:07:44 10:07:46 10:07:49 10:07:53

A. Please explain the words "under-marketed." I don't believe I used that, did I? 10:07:58 10:08:00

Q. Yeah, I believe you did. I mean, we could pull it up from the transcript. I have a quote here, "Kids are under-marketed." 10:08:02 10:08:05 10:08:07

A. What I believe I was speaking about is that there have not been very many -- there has been very little advertising coming from the state that actually targets kids under the age of 13 -- 10:08:10 10:08:15 10:08:22 10:08:27

Q. Isn't Prop --

A. -- on this issue. 10:08:33

Q. Isn't Prop 10 designed to do that specifically? 10:08:34 10:08:36

A. I don't think so. I think Prop 10 is designed to address the issues, but I don't believe 10:08:38 10:08:41

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

it actually puts the money -- spends advertising dollars targeting children under 13. It may, but I -- I don't believe so.

Q. Have you read Prop 10?

A. I have -- no, I have not read the whole piece of legislation.

Q. If, in fact, I were to tell you that Prop 10 was designed to reach children under 13, would that change your opinion with regard to what type of media plan you think the defendants in this case, should the plaintiff be successful, should be conducting?

MR. HULBURT: Let me object; that's vague and ambiguous, calls for speculation. It's an incomplete hypothetical, without giving him more information about how that hypothetical scenario's going to be implemented or designed or funded or promoted.

BY MS. SHERIDAN:

Q. I think I like the question the way it is. If you understand it, I'd like an answer, please.

A. It might.

Q. Okay. Can you think, as you sit here today, how it might change or impact the 12-month media plan as it's presently constituted?

MR. HULBURT: It's the same objections; that's an incomplete hypothetical, totally calls for speculation.

BY MS. SHERIDAN:

Q. You can answer if you understand the question.

A. There's no point in duplicating efforts.

Q. Right. Is it --

A. And so what I would want to see is if advertising dollars from Prop 10 were adequately -- were adequately reaching certain components of the audience that is targeted in the media plan, I wouldn't want to -- I wouldn't want to overkill it.

Q. Because, as you said yesterday, there's a risk of overkill in any advertising campaign, right?

A. That's correct.

Q. You mentioned yesterday that you sensed that there was somehow a disconnect. And it almost sounded like you were talking about a survey, because you said you'll ask people "Is ETS dangerous?" and people will say "Yes, ETS kills." And then you went through a series of questions, and the last ones were "Do you still smoke around others?" and the answer was "Yes." And you said, you know, there's a disconnect. Were you making reference to a specific survey where you got those questions and answers from, or were you just kind of speaking in a conversational mode?

A. No, that was -- that is my experience from -- you know, from -- from focus group sessions that were held on this issue that I have -- that I've been a part of on this issue over the past probably six years in California, and in other states.

Q. When was the last time in California that you were in a focus group where these questions were

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://industrydocuments.ucsf.edu/docs/tsjl0001

asked and you got answers consistent with what you testified about yesterday; in other words, that people acknowledge that they knew that ETS killed, but they still smoked around others? 10:11:53 10:11:53 10:11:53 10:11:56

A. Oh, three or four years ago. 10:11:58

Q. Was that in connection with a particular ad that you were test marketing at Asher? 10:12:00 10:12:02

A. Not a particular ad. The practice would be to bring -- there were two reasons. Let me just back up. There were two reasons to do focus groups. One was to get a better understanding of where the various target audiences heads were at, what their knowledge was, what their feelings were, what their opinions were, and you would use that information to construct new advertising. 10:12:05 10:12:08 10:12:13 10:12:16 10:12:18 10:12:23 10:12:27 10:12:30

Usually the -- usually the formula used in those sort of sessions was either to bring along very, very rough advertising concepts as conversations -- which functioned as conversation starters or concepts or story boards or layouts of ads that you were really trying to get a better fix on on what you might do to improve them, or whether or not to go forward with them at all. 10:12:34 10:12:40 10:12:46 10:12:49 10:12:51 10:12:58 10:13:01 10:13:05

The nature of focus groups is that it's highly conversational. It's not question answer, question answer. It's very much a conversation and a dialogue among the people in those rooms. 10:13:07 10:13:10 10:13:14 10:13:17

Q. I see. So, in other words, you haven't seen any formal surveys that have been conducted that reflect what you stated yesterday, that two or three years ago people may have believed that ETS killed, yet still smoked around others? 10:13:20 10:13:22 10:13:25 10:13:30 10:13:32

A. In -- in reviewing the SC report, the Andy Johnson report, there still seems to be a large percentage of people in the state -- I think anything more than around 15 percent is high -- but a large percentage of the population in the state that -- that still smokes around others. And there is an extremely high percentage of people in the state who are aware of the dangers of secondhand smoke. So that would seem to support that disconnect. 10:13:35 10:13:39 10:13:43 10:13:48 10:13:51 10:13:54 10:13:58 10:14:00 10:14:03

Q. Do you know when the report you're referencing by Andy Johnson and USC was issued? 10:14:05 10:14:09

A. The report I'm most familiar with is the report that I think we had on the table this morning, and it was a report that was issued at some point after -- either in or after 1997. 10:14:13 10:14:15 10:14:17 10:14:19

Q. Okay. Do you have any reason to doubt the figures that are stated in the Andy Johnson report based on the figures we were citing to you yesterday as a result of the new Department of Health Services report? 10:14:25 10:14:28 10:14:29 10:14:32 10:14:35

MR. HULBURT: Well, let me interpose the same objections. He hasn't seen the report. He's seen a press release that you provided him. Calls for speculation. Lacks foundation. 10:14:39 10:14:40 10:14:43 10:14:45

BY MS. SHERIDAN:

Q. Do you want me to restate the question for you, or do you remember it? 10:14:50 10:14:51

A. Yeah. No, I think I do remember it. I don't have reasons to doubt the figures in the Andy 10:14:55 10:14:58

http://legacy.library.ucsf.edu/tid/bvr07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/tsjl0001

Johnson report because it was a report based on a certain period in time. Have those -- is it likely that those figures have changed? Prop 10 imposed a significant tax increase on tobacco products -- on cigarettes. And every time there's been a tax increase, it's resulted in reduction in smoking. So I'm sure the numbers are different today. 10:15:00 10:15:02 10:15:07 10:15:12 10:15:15 10:15:18 10:15:22

Q. Well, is it your understanding that when a cigarette tax goes into effect, smoking rates decline initially but then rise again? 10:15:25 10:15:27 10:15:31

A. It's my understanding that -- yes, that's correct. 10:15:33 10:15:37

Q. Do you know when Prop 10 went into effect? 10:15:38

A. I believe Prop 10 went into effect immediately after the election, which would have been -- boy, how time flies. Was that '98 or '99? I don't remember anymore. 10:15:40 10:15:43 10:15:51 10:15:56

Q. By your previous answer did you mean to suggest that you think that the figures we were citing you yesterday regarding a decline in youth smoking may be related to the passage of Prop 10 and cigarette prices being higher? 10:15:57 10:15:59 10:16:03 10:16:07 10:16:09

A. Which -- which figures? Are you speaking about the press release? 10:16:12 10:16:14

Q. Yeah, the decline in youth smoking. 10:16:15

A. I suspect -- this is just based on my experience. I suspect that any increase -- that the decline in youth smoking is connected to an increase in prices -- 10:16:18 10:16:21 10:16:25 10:16:31

Q. What about -- 10:16:32

A. -- among -- among other factors. But I believe it to be a very large and important factor. 10:16:33 10:16:35

Q. What about decline in adult smoking? 10:16:37

A. The -- I believe it would have that effect, as well, though -- though less because of the tax situation. Obviously kids are more -- you know, money is a bigger issue for kids than it is for adults. 10:16:42 10:16:46 10:16:52 10:16:56 10:16:59

Q. And when this -- these figures make reference to adult smokers voluntarily banning smoking in their homes at rates nearly four times the national average, do you connect that to the tobacco tax as well? 10:17:03 10:17:06 10:17:09 10:17:12 10:17:14

A. No, not especially. 10:17:16

Q. You mentioned yesterday -- you were listing out some of the clients that you currently represent at Initiative Media. Some of them were Circle K, and Albertsons. Do you represent any other retail establishments? 10:17:22 10:17:24 10:17:27 10:17:31 10:17:34

A. Yes. 10:17:34

Q. What are the other ones you represent? 10:17:36

A. The Home Depot, Ralph's supermarkets, Stater Brothers supermarkets, Trader Joe's. Are you speaking in California? 10:17:43 10:17:45 10:17:57

Q. Yes. 10:17:58

A. Paul's Big Screen TV's, Disneyland, the California Angels, the Mighty Ducks of Anaheim, the Disneyland -- the various hotels at Disneyland. 10:18:02 10:18:21 10:18:31

Q. Other than retailers like Circle K, Albertsons, Ralph's, any other stores like that that you represent? 10:18:35 10:18:38 10:18:41

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - https://industrydocuments.ucsf.edu/docs/tsjl0001

MR. HULBURT: Stores that sell cigarettes, I believe. 10:18:45 10:18:46

THE WITNESS: Stores that sell cigarettes, yeah, I -- I figured that. There may be another supermarket that just isn't clanging in my head right now. 10:18:46 10:18:47 10:18:53 10:18:56

BY MS. SHERIDAN:

Q. Okay. The reason I ask is, are you aware that there are a whole slew of retailers that have been sued in this case as well? 10:18:57 10:19:00 10:19:06

A. No. 10:19:06

Q. So you don't know whether or not any of the retailers that are defendants in this case are also clients of yours? 10:19:06 10:19:08 10:19:11

A. I do -- do not know. 10:19:13

Q. Would that present a conflict? 10:19:13

A. Don't know. 10:19:15

Q. Would you be interested to know which retailers are being sued in this case, to see if any of them are clients for your company? 10:19:15 10:19:17 10:19:20

A. Sure. 10:19:22

Q. When you were first retained in this case by Preston Gates, were you told what the basis of the lawsuit against the defendants was? 10:19:24 10:19:26 10:19:29

A. Yes. 10:19:32

Q. What were you told? 10:19:33

A. I was told that it was based on Prop 65. 10:19:34

Q. Did you know what Prop 65 was at that time? 10:19:38

A. It was explained to me. 10:19:40

Q. Okay. The reason I ask is, in the July 2nd memo that you sent to your group regarding the planning assignment -- this is my copy, but do you know what memo I'm referring to? We talked about it yesterday. 10:19:41 10:19:46 10:19:49 10:19:53 10:19:55

A. Yes, I do. 10:19:56

Q. It's Bates stamp number PX-BS-000637. And you state in here -- 10:19:57 10:20:01

MR. HULBURT: It's Exhibit 843. 10:20:04

MS. SHERIDAN: Okay. From yesterday. Thank you. 10:20:06 10:20:07

BY MS. SHERIDAN:

Q. You state in here at the second full paragraph, "The city is suing for 300 plus million to recover medical costs associated with treating people 10:20:08 10:20:13 10:20:17

who may have contracted various tobacco-related illnesses, cancer, heart disease, emphysema, et cetera, as a result of contact to ETS." Do you see that? 10:20:20 10:20:23 10:20:26 10:20:30

A. Yes. 10:20:30

Q. Was that -- was that explained to you to be the basis of this suit when you were first retained by Preston Gates? 10:20:30 10:20:33 10:20:35

A. I don't recall. 10:20:36

Q. Do you --

A. But I -- I -- I obviously believed that that was the basis, or my understanding of it, at any rate, at the point that we initiated the assignment. 10:20:38 10:20:41 10:20:44

Q. Okay. And at some point subsequent to that, your understanding of the assignment -- or your understanding of the basis of the suit changed? 10:20:47 10:20:49 10:20:52

A. Yes. 10:20:55

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - industrydocuments.ucsf.edu/docs/tsjl0001

Q. Okay. Is it your understanding that the basis of the suit is still Prop 65? 10:20:56 10:20:58
A. It's my understanding that it's not Prop 65. 10:21:02 10:21:04
Q. Okay. What is your understanding of the current basis of the suit against the defendants? 10:21:04 10:21:05
MR. HULBURT: Let me just object; it's irrelevant, it's beyond the scope of his designation and has nothing to do with his opinions in this case. 10:21:07 10:21:09 10:21:11
BY MS. SHERIDAN:
Q. You can still answer. 10:21:14

237

A. My understanding is that this has to do with -- regarding the practices of the tobacco industry as -- in essence, as negligent. I'm not -- I'm not an attorney. I don't know the legal aspects of this. I'm here because they want my opinions as an advertising professional. 10:21:16 10:21:19 10:21:22 10:21:30 10:21:32 10:21:36
Q. Okay. Well, have you -- is it your understanding that the basis of this suit is that the tobacco companies have somehow broken some state law and that's why we're being sued in the case? 10:21:37 10:21:40 10:21:42 10:21:46
MR. HULBURT: Same objection; it's -- it's irrelevant, and it's not reasonably calculated to lead to admissible evidence, calls for speculation. 10:21:49 10:21:49 10:21:51
BY MS. SHERIDAN:
Q. Go ahead. 10:21:54
A. I don't know. 10:21:56
Q. Well, did anybody ever explain to you why Preston Gates faded out of this suit? 10:22:00 10:22:02
MR. HULBURT: Same objections. 10:22:05
THE WITNESS: No. 10:22:08
BY MS. SHERIDAN:
Q. Okay. Did you ever ask anybody, "Why is Preston Gates departing from this suit?" 10:22:08 10:22:11
A. No. It -- it really didn't -- it just was explained that they were turning the suit over to what they referred to as co-counsel. 10:22:15 10:22:20 10:22:22
Q. Okay. And you never asked why? 10:22:26
A. No. 10:22:28

238

Q. In the same paragraph I just referred to in the July 2nd memo you state, "The city is suing for 300 plus million." Was it your understanding, when you were first retained in the suit, that the City of L.A. was the plaintiff in this case? 10:22:30 10:22:31 10:22:35 10:22:38 10:22:42
A. That's what I thought it was. 10:22:44
Q. Okay. Do you know who the current plaintiff in this case is? 10:22:45 10:22:46
A. I've been told it's the American Environmental something. 10:22:46 10:22:50
Q. Okay. And do you know what that group is? 10:22:54
A. No. 10:22:56
Q. Do you know if the City of L.A. is still a party to this suit? 10:22:57 10:23:00
A. Don't know. 10:23:01
MS. SHERIDAN: I think that's all I have now. Thank you. 10:23:01 10:23:09
THE WITNESS: American Environmental Safety Institute. I did know it. 10:23:11 10:23:12
MS. SHERIDAN: Okay. 10:23:17
THE VIDEOGRAPHER: Do you want to go off? 10:23:17
MR. RICHARDSON: Yes. 10:23:18

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf
Support provided by the UCSF Industry Documents Library. http://industrydocuments.ucsf.edu/docs/tsjl0001

THE VIDEOGRAPHER: Okay. Off the record at 10:23 a.m. 10:23:19
(Recess taken.) 10:23:21
THE VIDEOGRAPHER: We're back on the record at 10:34 a.m. 10:34:20
//// 10:34:40
10:34:47
10:34:47

239

EXAMINATION BY MR. BERN: 10:34:47
Q. Good morning, Mr. Silverman. My name is Martin Bern. I'm an attorney for Philip Morris, Incorporated. Between the conclusion of the deposition yesterday and today, did you do anything further to prepare for your deposition today? 10:34:47 10:34:47 10:34:50 10:34:54 10:34:56
A. No. 10:35:00
Q. You didn't review any materials, any documents? 10:35:01 10:35:03
A. No. 10:35:05
Q. Did you meet with counsel for plaintiff? 10:35:06
A. After the deposition ended yesterday? 10:35:10
Q. Yes, or -- 10:35:13
A. Very, very briefly. 10:35:14
Q. Yes. How long do you think you met with him? 10:35:16 10:35:18
A. Five minutes. 10:35:18
Q. Okay. And did you have a chance to meet with him this morning to prepare? 10:35:19 10:35:21
A. A little bit, five minutes. 10:35:24
Q. And what was the content of the discussion this morning with Mr. Hulburt? 10:35:26 10:35:28
A. Try to respond to the questions as asked. 10:35:32
Q. That's always sage advice. 10:35:35
MR. HULBURT: We also found donuts. 10:35:39
MR. BERN: Oh, good. 10:35:43
BY MR. BERN:
Q. Is there any reason why the testimony you're giving today isn't your best testimony? 10:35:44 10:35:45
You're not on any medication or feeling ill for any reason, are you? 10:35:49 10:35:52
A. No. 10:35:52
Q. Okay. That's just a standard question I wanted to make sure we -- we had that behind us. You look perfectly healthy. 10:35:52 10:35:54 10:35:56
A. Thank you. 10:36:01
Q. I had a few areas I wanted to touch upon, one of which relates to the media campaign. 10:36:01 10:36:02
Yesterday I believe you testified that the 12-month campaign actually was conceived of as being implemented over a number of years rather than just a single year; is that correct? 10:36:04 10:36:06 10:36:10 10:36:12
A. Yes, sir. 10:36:14
Q. And I believe you testified that it was your view that the campaign should be run for perhaps at least three years; is that right? 10:36:15 10:36:16 10:36:20
A. Yes. 10:36:22
Q. Was that your original thinking when you developed the plan, that it would run for three years? 10:36:23 10:36:25 10:36:29
MR. HULBURT: I think yesterday he said three to four years. He said that a couple times. 10:36:29 10:36:30
BY MR. BERN:
Q. Was your original thinking that it would run for three to four years? 10:36:34 10:36:36

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the Industry Documents Library: industrydocuments.ucsf.edu/docs/tsjl0001

A. Yes. 10:36:37

241

Q. And did you have an understanding, other than what you just testified about with regard to the $300 million figure that the Preston Gates & Ellis firm gave to you, as to what that $300 -- $300 million figure was based on? 10:36:38 10:36:40 10:36:43 10:36:47 10:36:50

A. I really don't recall. 10:36:54

Q. You had understood basically that there was potential for $300 million being available for the media campaign; is that correct? 10:36:56 10:36:59 10:37:02

A. Yes. 10:37:03

Q. And could you have spent more than the 100 million plus dollars a year that the media campaign that you've put forth, in your opinion, if more funds were available? 10:37:03 10:37:11 10:37:14 10:37:16

A. Spend them appropriately? 10:37:21

Q. Yes. 10:37:23

A. I don't think so. 10:37:24

Q. Okay. So then your $106 million media campaign, as it was designed in July of 1999, is appropriately a zero-based plan as you -- as you described it yesterday; is that correct? 10:37:25 10:37:28 10:37:33 10:37:38

A. Yes. 10:37:39

Q. Have you ever done a zero-based media plan, other than the one that you prepared for your expert opinion in this case? 10:37:40 10:37:45 10:37:47

A. Yes. 10:37:48

Q. Could you tell me about that; who that was for? 10:37:49 10:37:51

242

A. I've done many. 10:37:51

Q. These are for paying clients? 10:37:53

A. Yes. 10:37:55

Q. And they basically have a message they want to get across, and they don't care how much it costs to get that message across? 10:37:55 10:37:58 10:38:01

A. Oh, no. They absolutely care how much it costs to get the message across. But there are -- there are basically two ways to do any advertising plan, media plan. And one is to do it on a budget base where they say we have "X" amount of dollars, or they say how much would it cost to, fill in the blank, to achieve certain goals. Generally speaking, when you're working with new advertisers -- either advertisers that haven't advertised before, advertisers that are -- have advertised, but possibly have all new objectives, new companies, start-up businesses, et cetera, you create -- one of the methodologies of doing a good media plan is to begin by doing a zero-based plan. Then you allow the budget limitation to come in, and you edit down -- generally, you end up editing down from that. But it's a tremendously useful exercise. And I've seen any number of cases where the zero-based plan is the plan that the clients go with. 10:38:02 10:38:05 10:38:09 10:38:11 10:38:15 10:38:18 10:38:22 10:38:26 10:38:29 10:38:32 10:38:36 10:38:41 10:38:46 10:38:51 10:38:54 10:38:58 10:39:03 10:39:07 10:39:11

We're working now with many, many dot com companies, many of which never existed before. In many cases those -- the plans that have been 10:39:12 10:39:15 10:39:20

243

developed for those companies -- that brand new company's sometimes marketing in a manner or performing services in a manner that was never 10:39:24 10:39:26 10:39:31

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

available before current technology. We've done zero-based plans. We have implemented zero-based plans because these firms -- the plan results in a budget that they can afford.

Q. So, then, in the instances where zero-based plans were actually implemented by your clients, it was because the goal that was set and the zero-based plan that was developed was within their financial means, they were willing to spend that money; is that correct?

A. That's correct.

Q. And have you ever had a zero-based plan that was proposed in excess of $100 million for any client?

A. Yes.

Q. How many clients would you say that in that -- in that 100 million plus area?

A. We do zero-based plans typically for the major divisions of the Walt Disney company.

Q. Maybe I should clarify my question. With regard to zero-based budget plans that are developed and then implemented, how many clients have you had actually implement those plans for a 12-month period in excess of $100 million a year?

A. In my career?

Q. Let's say in the last five years.

A. I can think of four or five.

Q. Can you tell me who they are?

A. E-trade, American Honda, for their Acura division, the picture division of the Walt Disney company, the home video division of the Walt Disney company, Unilever.

Q. I couldn't help notice that the $100 million per year budget multiplied by three years happens to come out around the $300 million figure that Preston Gates & Ellis provided to you in your initial meeting as the potentially available funds. Is that just a coincidence?

A. No, it's not a coincidence. As noted in my own memo to the planning department, I felt that we probably shouldn't spend more than $100 million a year. Media planning is not a precise science. To a degree, there's a certain amount of art in it. There's a certain amount of qualitative judgment that goes into it. You get very precise when you are trying to figure out what things cost and how it's going to lay out. But even on a zero-based budget, I suppose I could just say, "Go ahead and just, you know, tell me exactly what you think it would be," without any parameters.

But I believe there should have been some parameters. If there was -- ultimately, at least I believed, there was going to be about $300 million

available over a three-year period, I didn't see any point to go beyond it because -- especially given the assignment we had, which was to crank out a media plan in a relatively short period of time. I didn't want to find ourself in a position where we delivered something to the client, and the client said, "This is useless."

Q. If you had delivered a media plan that was

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

only $10 million a year to the client would they have considered that useless? 10:43:19 10:43:24

A. I don't know. 10:43:26

MR. HULBURT: Calls for speculation. 10:43:27

BY MR. BERN:

Q. You testified that you didn't see a point in submitting something that was more than what you understood to be the potentially available funds. Did you see a point in submitting something that might have been less than the potentially available funds? 10:43:29 10:43:30 10:43:32 10:43:34 10:43:36 10:43:39

A. If it turned out to be less, we would have recommended it. 10:43:44 10:43:47

Q. So you don't think you could have done an appropriate campaign with perhaps just a limit of $50 million a year instead of $100 million a year? 10:43:50 10:43:53 10:43:59

A. The assignment -- I could only react to the assignment that was given to me. The assignment that was given to us was what would do the best possible job. The essence -- the strategy is sacrifice. So 10:44:02 10:44:05 10:44:07 10:44:11

if someone came and said, "You only have $50 million," I would come back and say, "Here's what I can achieve for $50 million." It's -- it's just two ways of going at an assignment. That wasn't the assignment we were given. 10:44:19 10:44:23 10:44:26 10:44:28 10:44:32

Q. Is it true in your industry that the last 10 percent of achievement of a particular goal may cost more than just 10 percent of your overall budget; that is, is driving home the point, say, to the last 10 percent of people you're trying to reach more expensive than the first 10 percent of people you try to reach? 10:44:33 10:44:38 10:44:42 10:44:44 10:44:48 10:44:50 10:44:53

A. Yes. 10:44:55

Q. So at some point there's a point of diminishing returns; is that correct? 10:44:55 10:44:56

A. Yes. 10:44:58

Q. And did you do any analysis in creating the media plan about whether you had reached the point of diminishing returns with regard to this media plan that you've based your opinion on in this case? 10:44:58 10:45:02 10:45:05 10:45:07

A. We did not do extensive analysis. However, it is reflected in the plan, because the plan doesn't attempt to reach 100 percent of any of the populations. 10:45:10 10:45:12 10:45:15 10:45:18

Q. So, as you sit here today, you don't know whether the plan would be half as expensive as it's -- as currently proposed, and only reach perhaps 10 percent fewer of the target -- targeted audience; is 10:45:20 10:45:22 10:45:27 10:45:30

that correct? 10:45:33

A. I don't know that. I would -- I would doubt very much that that would be the case, though. 10:45:35 10:45:38

Q. Can you tell me how much savings on the $100 million a year would be achieved in a reduction of just 10 percent nonachievement of the goal that was set forth? 10:45:40 10:45:42 10:45:47 10:45:51

A. Not offhand. 10:45:52

Q. Now, at the time that you formed your opinion and prepared the media plan in July of 1999, it was your understanding that Initiative Media would be hired to implement this plan; is that correct? 10:45:58 10:46:00 10:46:05 10:46:10

A. No. 10:46:12

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the UCSF Library
http://www.industrydocuments.ucsf.edu/docs/tsjl0001

Q. What was your understanding at the time that you prepared the plan? 10:46:16 10:46:17
A. My understanding is that we would probably have a very good shot at it. But at that time the way it was explained to me was that if this lawsuit was successful, that it was -- it was likely that some sort of private institution would be administering the campaign. And if that was the case, we'd have a good shot at it, a very good shot at it, since we were the authors of the plan, and given that it's the state -- that it happens to be running in the state of California, where we are so much more dominant than any of our competitors, we would be the most likely -- that we are the most dominant player, as well as involved in other anti -- 10:46:20 10:46:23 10:46:33 10:46:33 10:46:36 10:46:39 10:46:42 10:46:46 10:46:50 10:46:53 10:46:55 10:46:59 10:47:04

or tobacco use prevention activities, and have a great deal of expertise in that area, that we would be the most likely people to win it. 10:47:09 10:47:13 10:47:16
Q. Are there any other companies in your opinion that would be qualified to implement $100 million campaign on ETS in California? 10:47:19 10:47:20 10:47:22
A. Yes. 10:47:26
Q. How many others are there that would qualify? Just an estimate, if you can. 10:47:27 10:47:29
A. A handful. 10:47:34
Q. Okay. Isn't it correct to say, though, that you -- you fully expected that you would -- that Western Initiative Media would be appointed by the foundation that you described to administer the $300 million award, if such an award were achieved? 10:47:35 10:47:37 10:47:42 10:47:46 10:47:50
A. Yeah. With an emphasis on the word "if." If it was achieved. I'm not -- I'm not an optimist when it comes to lawsuits. 10:47:52 10:47:55 10:47:58
Q. No, I understand that. But assuming that plaintiffs were to win and that there was going to be $300 million, and that a plan was going to be implemented, you expected that Initiative Media would be hired to implement that plan; is that correct? 10:48:00 10:48:02 10:48:04 10:48:07 10:48:10
A. I believe we would be most likely, that's correct. 10:48:12 10:48:14
Q. How much would Western Initiative Media make per year in the implementation of $106 million media campaign, such as the one that you've proposed 10:48:16 10:48:19 10:48:25

as your opinion in this case? 10:48:27
A. Gross revenues? 10:48:31
Q. Yes. 10:48:33
A. I would guess that we would make somewhere in the neighborhood of 4- to $5 million. 10:48:37 10:48:40
Q. So in the neighborhood of 4 percent, 4 to 5 percent? 10:48:45 10:48:50
A. 4 to 5 percent fee, that's correct. 10:48:50
Q. And that would continue for each year of the -- of the media plan. So you expected three years, then potentially there would be 12 to $15 million of revenue for -- for your company; is that right? 10:48:52 10:48:55 10:48:57 10:49:00 10:49:03
A. I -- I didn't think about it over a longer term. I did think about one year. 10:49:05 10:49:09
Q. And in thinking about it, how much of that 4 to 5 million is actually profits of the bottom line for your company? 10:49:12 10:49:16 10:49:19

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf Digitized by the Internet Archive in 2014 https://www.industrydocuments.ucsf.edu/docs/tsjl0001

(Whereupon, Mr. Lendrum left the proceedings.)

THE WITNESS: We work at about a 10 percent margin. So bottom line profit on that would be about 400- to 500,000 -- excuse me -- yeah, 4- to $500,000. 10:49:24 10:49:26 10:49:32

BY MR. BERN:

Q. For one year? 10:49:39

A. Correct. 10:49:40

Q. And is it true that the -- you charge for your services on a percentage basis, or when you gave the 4-1/2 to -- 4 to 5 percent estimate, is that just how it comes out? 10:49:50 10:49:54 10:49:56 10:50:01

A. We charge any number of ways. We charge as attorneys do, by the hour. We charge on a pure fee basis, where it's task based. We estimate what our costs will be. We work on cost plus basis. And we work on a commission basis on -- in essence, on a percentage of the amount spent in media. It is highly negotiable, and it varies by client from -- it varies -- it varies -- every client has a different deal. I'm using -- the percentages I've quoted are consistent with the -- consistent with what we charge to handle the work for the California Department of Health Services. 10:50:01 10:50:01 10:50:05 10:50:10 10:50:13 10:50:17 10:50:19 10:50:23 10:50:29 10:50:31 10:50:36 10:50:40 10:50:44

Q. Is that the same sort of percentage that you work on with your private sector clients as well? 10:50:45 10:50:48

A. Yeah. It varies -- it varies by task. If -- when you -- when you advertise in -- locally, and by nature, that's if you're doing one state, it's local advertising. Local advertising is much more expensive for us on a cost basis to implement than national advertising. So, for example, if we're buying national advertising, that is network television or national cable television, for a large client, the percentages are considerably lower because the task is considerably easier. 10:50:51 10:50:57 10:51:01 10:51:04 10:51:07 10:51:11 10:51:14 10:51:16 10:51:20 10:51:24

Q. You didn't have any conversations with any counsel for the plaintiffs in this case about what kind of a fee arrangement you would have for implementation of the media plan that's set forth in the plan that is the basis for your opinion, did you? 10:51:30 10:51:33 10:51:36 10:51:39 10:51:42

A. None at all. 10:51:45

Q. Now, is it correct to say that the media plan is directed at both smokers and nonsmokers with respect to behavior change regarding the goal of -- of preventing exposure to ETS? 10:51:50 10:51:53 10:51:57 10:52:02

A. Yes. 10:52:04

Q. Why is that? Why is it directed at both smokers and nonsmokers? 10:52:05 10:52:10

A. Well, it's directed to smokers because you'd like to inform them of -- to -- to reinforce the risks to others and appeal to their conscious, in essence, or both conscious and just sense of responsibility to modify their behavior by not smoking around others. It is -- you then communicate to nonsmokers, who may come in contact with smokers, to further advise them of the risks, as well as to give them reasons to modify their behavior by avoiding contact with smokers by -- by literally going as far as possibly asking smokers to not smoke in their presence. In the case of children trying to 10:52:11 10:52:14 10:52:21 10:52:28 10:52:37 10:52:37 10:52:39 10:52:43 10:52:49 10:52:53 10:53:01 10:53:04

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

encourage their parents to not smoke at home, not to be smoking in automobile -- not to be in automobiles where other people smoke, et cetera. 10:53:08 10:53:12 10:53:15

Q. Okay. So, then, if I understand your answer, the media plan focuses on smokers to try and get them to not expose others to ETS, and at the same time it focuses on nonsmokers to get them to take action either to have smokers not expose them to ETS or to remove themselves from a situation where they may be exposed to ETS; is that -- 10:53:17 10:53:20

252

10:53:26 10:53:29 10:53:33 10:53:37 10:53:40

A. That's correct. 10:53:42

Q. And can you break into percentages the dollars that are proposed to be spent in the media plan between the smoker group and the nonsmoker group? 10:53:43 10:53:46 10:53:48 10:53:52

A. The only way I could do that would be just to say that it would be reflected by the smoker versus nonsmoker group in the general population. The media plan doesn't specifically target smokers versus nonsmokers in that manner, unless you're looking at small children which are -- you know, generally speaking, are nonsmokers. 10:53:56 10:53:59 10:54:01 10:54:07 10:54:11 10:54:14 10:54:17

Q. So you would say there's a lot of advertising in this media plan that's not directed at smokers? That is, for instance, I noticed a lot of things directed at children, who I believe in this instance we assume would be nonsmokers; isn't that right? 10:54:19 10:54:22 10:54:26 10:54:30 10:54:32 10:54:35

A. Well, your question has two parts. I'll answer the second part. A lot of -- you know, a significant amount of money -- a significant portion of the plan is directed at children, who are non -- who, for the most part are nonsmokers. As far as the adult population, or teen and adult population, it's virtually impossible to direct advertising at smokers, specifically at smokers. The -- the -- there aren't media vehicles that simply go to smokers. There are some media vehicles in which smokers tend to be maybe a larger part of the viewing population, or readership population, than others. But, in general, in a general campaign such as this one, it's very hard to distinguish. 10:54:36 10:54:39 10:54:44 10:54:45 10:54:51

253

10:54:55 10:55:01 10:55:05 10:55:13 10:55:15 10:55:18 10:55:21 10:55:25 10:55:27

Q. Let me ask it this way: If you were tasked with an objective to just have a campaign that targeted nonsmokers, to have them either tell smokers not to smoke around them or to avoid situations where they would be exposed to cigarette smoke, wouldn't that campaign be a subset of the campaign that's in the media plan that you've prepared? 10:55:30 10:55:32 10:55:36 10:55:42 10:55:47 10:55:49 10:55:53

A. Under that hypothetical, if it was doable, it could be a subset. I -- I -- 10:55:57 10:56:02

Q. Let me ask you --

A. I don't think -- I don't think I would know how to do that. I don't think there's a way to reach exclus -- what you just defined as exclusively nonsmokers. 10:56:07 10:56:08 10:56:10 10:56:13

Q. Well, the ads that you would develop to direct at smokers to reach their conscious and to get them not to smoke around other people would be different, would they not, than ads that you would direct at nonsmokers, to embolden them to either tell 10:56:14 10:56:18 10:56:23 10:56:25 10:56:30

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/tsjl0001

smokers not to smoke around them or to avoid ETS altogether? 10:56:35 10:56:38

A. You're talking about creative messaging? 10:56:38

Q. Yes. 10:56:41

A. I'm not sure -- I'm not sure we would -- I'm not sure I would want to do it that way. The reality is that you can't -- there -- there isn't a communication vehicle out there, that I'm aware of, that you can segregate smokers versus nonsmokers in the way they look at advertising. Therefore, when you're doing advertising, you'd have to create it in such a manner that the message that is being sent to smokers and to nonsmokers would work at both of them in some manner. I just don't know any way of segregating it. If you're doing billboards, I don't know of any streets that -- that people drive down that have billboards on that outlaw smokers. 10:56:46 10:56:48 10:56:51 10:56:56 10:57:00 10:57:05 10:57:06 10:57:10 10:57:16 10:57:19 10:57:24 10:57:27 10:57:30

Q. Well, but car racing magazines, for instance, are more likely to be read by smokers than they are by four-year-old children; isn't that correct? 10:57:33 10:57:35 10:57:38 10:57:41

A. Yes. 10:57:41

Q. And kids shows on Saturday morning are more likely to be watched by four-year-olds than they are by adult smokers; is that correct? 10:57:41 10:57:44 10:57:47

A. Yes. 10:57:49

Q. So then aren't there aspects of the media plan, as you've proposed it here, that really are 10:57:49 10:57:51

directed at one or the other of these two audiences that we've described, that is, the smoker and the nonsmoker? 10:57:54 10:57:57 10:58:00

A. No. The two audiences you described from a media standpoint are adults -- are adults and children. The media vehicles you've described are special interest magazines versus kid television shows. Yes, you create advertising to fit target demographics. And the advertising that you create to run on Saturday morning cartoon shows would be radically different than the advertising you would run in magazines that have a high proportion of smokers among their leaders. And in car magazines, which might have a larger percentage of smokers in their readership group than magazines in general. 10:58:00 10:58:03 10:58:05 10:58:09 10:58:11 10:58:19 10:58:21 10:58:24 10:58:26 10:58:29 10:58:33 10:58:37

It is not unlikely that the angle one might take creatively would be to recognize that a large -- that, you know, you're going to get a good proportion of smokers in that environment so that the angle of that ad could speak more to those people, to the smokers. But there's also going to always be, or virtually always be, a majority of the readers of the magazine that are nonsmokers. The -- the only magazine that I can even think of where the majority of the readers smoke is "Cigar Aficionado." And they smoke cigars. 10:58:42 10:58:46 10:58:50 10:58:53 10:58:55 10:59:00 10:59:04 10:59:07 10:59:09 10:59:15 10:59:21

Q. If we could focus on the nonsmoking group for a second. Is it fair to say that the majority of 10:59:21 10:59:26

individuals that are being targeted in the nonsmoking group constitute children? 10:59:28 10:59:31

A. Could I look at the plan? 10:59:38

Q. Please. 10:59:39

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Support https://www.industrydocuments.ucsf.edu/docs/tsjl0001

A. Could you repeat the question, please. 11:01:05
MR. BERN: Could we have the last question 11:01:06
back, please. 11:01:07
(Record read.) 11:01:19
THE WITNESS: No. 11:01:19
BY MR. BERN:
Q. Could you tell me what the majority of the 11:01:19
nonsmoking group constitute demographically? 11:01:23
A. Very -- are you asking a specific 11:01:28
percentage? 11:01:32
Q. Your best estimate, if you have one. 11:01:33
A. I don't have a specific percentage. I'd 11:01:36
have to go back and really study the plan, and I'm 11:01:38
not sure it's in the plan, but it might be in some of 11:01:42
the backup material that's been provided with the 11:01:44
plan. But just looking at the media flow charts 11:01:47
themselves and looking at the spending, it is very 11:01:50
clear that the majority of the spending -- vast 11:01:56
majority of the spending is directed to adults and to 11:01:59
teenagers. 11:02:02
Q. And is that true for the nonsmoking 11:02:03
category that I defined for you? 11:02:06
A. As I said, I don't know how to break it 11:02:09
between smokers and nonsmokers, other than to say 11:02:11

that nonsmokers represent the majority of the adult 11:02:14
population in California. So, therefore, the 11:02:18
majority of the dollars would be directed to 11:02:21
nonsmoking adults and teenagers. 11:02:24
Q. So is it -- would you agree that the ETS 11:02:28
warnings that were given through the Prop 99 campaign 11:02:31
were directed at adult nonsmokers? 11:02:34
A. The majority of the -- the majority of the 11:02:42
-- the ETS -- the specific ETS subject matter 11:02:50
commercials, the commercials that -- that were hinged 11:02:54
on ETS, were directed at adults. Teens were very 11:02:58
much a secondary audience. Kids were an accidental 11:03:08
audience. And I don't -- I don't think that any 11:03:12
attempt was really made to differentiate from a media 11:03:21
standpoint between smokers and nonsmokers, other than 11:03:23
to how it fell out among the general population that 11:03:27
was watching the television advertising or hearing 11:03:29
the radio advertising. 11:03:33
Q. Is your firm involved at all in doing ads 11:03:38
for the Prop 10 campaign or doing a media campaign 11:03:42
related to Prop 10? 11:03:46
A. We -- we did the media buying for the Prop 11:03:48
10 initiative, and we do the media buying for the 11:03:56
California Children and Family Commission, or for 11:04:02
some components of the California Children and Family 11:04:06
Commission campaign. 11:04:11
Q. So then you're doing media buys for the 11:04:12
actual ads that are being placed under Prop 10; is 11:04:18

that correct? 11:04:21
A. That's correct. Well, not of all of them, 11:04:21
but some. 11:04:25
Q. And -- but your firm didn't do any of the 11:04:25
creative work with regard to those ads? 11:04:27
A. We don't do creative. 11:04:29
THE REPORTER: I'm sorry. Can you repeat
that.
MR. BERN: Yes. And your firm didn't do

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

any of the creative work with respect to those ads?
THE WITNESS: No, we don't -- we don't do creative. We're not an advertising agency. 11:04:32
BY MR. BERN:
Q. Your firm did not work on the media plan 11:04:36
for Prop 10 in any way? 11:04:38
A. No. 11:04:40
Q. Do you know who did that plan? 11:04:42
A. It was done by the political consulting 11:04:44
firm that was managing the Prop 10 campaign. 11:04:46
Q. Have you reviewed the ads that are being 11:04:54
placed by your firm pursuant to the funds from Prop 11:04:57
10? 11:05:01
A. No. 11:05:01
Q. So you haven't considered whether any of 11:05:02
those ads would effectively overlap with the July 11:05:03
1999 media campaign that you're -- that you've 11:05:06
proposed as part of your opinion? 11:05:08
A. No.

Q. Prior to giving --
MR. MILES: Is that clear whether that 11:05:14
means he is agreeing with you or disagreeing with 11:05:15
you? Could you read back the answer to the question, 11:05:18
the question and answer. 11:05:20
(Record read.)
BY MR. BERN:
Q. Does that mean that you have not considered 11:05:33
that? 11:05:34
A. I haven't considered that. 11:05:35
Q. Do you intend to amend the media plan to 11:05:43
eliminate duplicative aspects of the media plan that 11:05:51
are now covered by advertising that's being done 11:05:56
pursuant to funds raised by Prop 10? 11:05:59
A. If we were asked to do so, we would be -- 11:06:02
we would certainly be editing and adjusting the media 11:06:09
plan for many reasons, and that would be one of them. 11:06:19
Q. I believe yesterday you indicated that one 11:06:21
of the reasons you wanted to see a zero-based plan 11:06:22
developed for ETS in California was to see that it 11:06:28
was done right. I know that those weren't exactly 11:06:32
your words, but is that your view? 11:06:35
A. That's my -- that's certainly my view. 11:06:36
Q. Have you or your firm made any attempts to 11:06:40
lobby any political organization or the state with 11:06:44
regard to how the funds raised under Prop 10 should 11:06:50
be expended? 11:06:54
A. No. 11:06:55

Q. Have you or your firm lobbied any political 11:06:56
organization or governmental organization with 11:07:01
respect to the expenditure of funds paid by the 11:07:04
tobacco companies under the master settlement 11:07:08
agreement with respect to having those monies spent 11:07:11
for a warning campaign on ETS? 11:07:14
A. No. 11:07:16
Q. Is there any reason why you haven't? 11:07:19
A. We don't lobby. That's not our business. 11:07:20
Q. Well, you are aware that there are billions 11:07:28
of dollars being paid annually to the State of 11:07:29
California under the master settlement agreement, are 11:07:32
you not? 11:07:34
A. I am aware of that. 11:07:34

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Support provided by the UCSF Industry Documents Library. industrydocuments.ucsf.edu/docs/tsjl0001

Q. And is it your view that some amount of that money should be made available to do the kind of media campaigns that you consider should be done to, you know, quote, do it right, closed quote? 11:07:36 11:07:40 11:07:44 11:07:47

MR. HULBURT: You're asking his personal opinion about what should be done with state funds, is that the question? 11:07:50 11:07:51 11:07:53

MR. BERN: I'm asking his opinion as an expert who has suggested that there be a $100 million a year campaign to warn about the -- the risks of ETS. I'm asking him whether, consistent with the testimony he's given, he is of the view that the monies raised from the master settlement agreement ought to be spent towards that goal. 11:07:54 11:07:56 11:08:00 11:08:03 11:08:07 11:08:11 11:08:13

MR. HULBURT: Right. So that's a personal opinion about how he thinks state funds should be spent. 11:08:16 11:08:17 11:08:20

Mr. BERN: For now. 11:08:22

MR. HULBURT: Because it's beyond the scope of his designation as an expert. It's got nothing to do with his opinions in this case. I'll object on those grounds. 11:08:23 11:08:25 11:08:30 11:08:32

BY MR. BERN:

Q. You can answer. 11:08:33

A. I think it would be a good idea, given the health consequences of tobacco use and contact with tobacco smoke, that there be a very good strong campaign mounted. I don't much care, on a personal level, where the money comes from, how it's funded. I think it's in the interest of the public. I actually have no idea how the money from the master settlement agreement is being allocated in the state by the state government. I just don't know how it's -- how it's being used. I don't even know what the process is of -- or what the restrictions may be. Don't know anything about it. 11:08:34 11:08:39 11:08:43 11:08:46 11:08:51 11:08:55 11:08:58 11:09:01 11:09:06 11:09:10 11:09:15 11:09:17

Q. So your opinion that you're offering in this case doesn't include an opinion that the media plan that you developed in July of 1999 should be specifically paid for by the tobacco companies because of some culpability that you attribute to them; is that correct? 11:09:18 11:09:20 11:09:24 11:09:27 11:09:30 11:09:35

A. That's correct. 11:09:36

Q. I believe you testified yesterday that the media plan that you've developed is designed to constitute -- to -- I'm sorry -- strike that. 11:09:40 11:09:43 11:09:47

Is it correct that the media plan that you developed in July of 1999 is designed to combat the overall societal norm that smoking is a normative activity? 11:09:51 11:09:54 11:10:04 11:10:09

A. Yes. 11:10:10

Q. And that smoking in social situations is considered normative also; is that correct? 11:10:12 11:10:14

A. I don't know if smoking in societal situations is still considered normative in California. I don't know how it would compare if you were to go out and literally ask people "Is smoking normal, or is it aberrant?" I don't know how people would respond to that. But I do know that smoking is a social phenomenon. People smoke with other people, and it's certainly portrayed that way. It appears 11:10:19 11:10:21 11:10:25 11:10:28 11:10:33 11:10:36 11:10:41 11:10:46

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/tsjl0001

that way in life. It's portrayed that way in the media, in movies, in television. More in movies than in television. And it's portrayed that way in tobacco advertising. And that part of effecting social change is to deal with that normative behavior pattern and the way it's portrayed. 11:10:50 11:10:53 11:10:58 11:11:00 11:11:08 11:11:12

Q. So in your opinion that normative behavior pattern, as you just described it, is caused by many different factors; is that correct, including TV, 11:11:13 11:11:15 11:11:18

movies, and tobacco advertising? 11:11:22

A. I think it's caused -- I think that one can trace the history of it, and that I believe that that was actively promoted by the tobacco industry for generations. 11:11:25 11:11:29 11:11:31 11:11:35

Q. And is it your opinion that the normative behavior that the media plan that you designed in July of 1999 is trying to alter is, in part, behavior that has become ingrained as a result of TV's -- TV shows and movies, in part? 11:11:37 11:11:40 11:11:43 11:11:47 11:11:54

A. Certainly in part, yes. 11:11:58

Q. So it's not based entirely on only activity that was conducted by tobacco companies; is that correct? 11:12:00 11:12:05 11:12:07

A. I think that's correct. 11:12:09

Q. I want to ask you a few questions about current advertising that you reviewed as -- in preparation for preparing your expert opinion in this case. I believe you've testified yesterday, and again this morning, that current advertising by the tobacco companies supports the normative behavioral aspect of smoking; is that correct? 11:12:35 11:12:37 11:12:46 11:12:46 11:12:51 11:12:57 11:13:03

A. Yes. 11:13:05

Q. And I believe yesterday you testified that that was accomplished primarily through advertising that depicted smoking in social settings; is that correct? 11:13:07 11:13:10 11:13:14 11:13:17

A. Correct. 11:13:17

Q. Is there some other aspect of tobacco advertising that you think supports the normative behavior of smoking in social settings? 11:13:18 11:13:20 11:13:24

A. I think that tobacco advertising, in general, glamorizes the use of tobacco products. And it -- it manifests itself differently by brands, certainly. But if you were to look at advertising for Virginia -- Virginia Slims, a brand manufactured by your client, it certainly portrays women who use that product -- or associates that product with strong, independently minded women, which is very aspirational. If you look at advertising for Camels, manufactured by R.J. Reynolds, it portrays many social situations, and it also presents it -- presents the product very, very clearly as a product that would strongly link with young adults who see themselves as hip, sheik, having great fun, being very much a part of today's social landscape. All of these things, in my mind, contribute strongly to furthering the -- the -- the -- the old idea that in social settings that smoking is acceptable, normative, and -- and just fine to do. 11:13:29 11:13:31 11:13:40 11:13:44 11:13:48 11:13:54 11:14:00 11:14:04 11:14:07 11:14:14 11:14:18 11:14:21 11:14:23 11:14:30 11:14:37 11:14:42 11:14:47 11:14:53 11:14:58

Q. I'd like to just focus, if we could, on the brands that my client manufactures. How is it that 11:15:03 11:15:05

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - https://industrydocuments.ucsf.edu/docs/tsjl0001

the campaign that you just described with regard to Virginia Slims supports the notion that it's normative behavior to smoke in social situations? 11:15:10 11:15:13 11:15:18

A. I think that what that advertising intends 11:15:24

to do is to show advertising -- is to show women -- portray women who are strong, independent, and the suggestion is that you should smoke, you should smoke Virginia Slims, and that if you smoke Virginia Slims, it is -- it's an insignia of your strength and independence as a person. That, to me, then continues on to the idea that that's a normal part of your behavior. And that since these women are very, very clearly women who would be involved in business, involved in social activities, it just leaps to the notion that they would clearly be smoking in and around other people that -- that brand. And the use of that brand is part of their key identification in life. It's an old -- old -- a very old idea in advertising that you are what you use, you are what you drive, you are what you wear, you are what you smoke, you are what you drink. 11:15:26 11:15:30 11:15:34 11:15:39 11:15:42 11:15:48 11:15:51 11:15:54 11:15:57 11:16:01 11:16:05 11:16:08 11:16:12 11:16:13 11:16:20 11:16:22 11:16:25

Q. I guess I'm a little confused, though. Wouldn't this -- wouldn't a campaign that drives towards strength and individuality be the antithesis of a social setting? I understand you're making a leap from saying that a person who is strong and individual would, therefore, be in business situations and might be smoking around other people. But that's certainly not depicted in any of the ads that drive home the point of strength and individuality; is that correct? 11:16:27 11:16:30 11:16:32 11:16:37 11:16:41 11:16:43 11:16:46 11:16:48 11:16:51 11:16:53

A. I don't -- I don't believe that strength 11:16:54

and individuality -- excuse me -- I don't believe that strength and individuality in any way lead to solitary behavior. Oh, thank you. 11:16:55 11:17:01 11:17:05

Q. Well, maybe we can look at a couple of examples. And these are from your files, so these are ads that I believe were provided to you by the attorneys at the Thorsnes firm; is that correct? 11:17:10 11:17:11 11:17:15 11:17:18

A. That's correct. 11:17:19

Q. And -- 11:17:19

MR. HULBURT: Let's be clear that we would have provided him a lot more ads if they had been produced by the defendants before his deposition. 11:17:19 11:17:22 11:17:23

MR. BERN: Well, funny, the last time I checked, "Cosmopolitan," "Glamor" and these other magazines were available on the newsstand. But thank you for your comment, Counsel. 11:17:27 11:17:28 11:17:32 11:17:35

BY MR. BERN:

Q. If -- I'm going to show you PX-BS-597 and 598. And this is from your file, and I'm happy to just give you this copy to take a look at so we don't have to dig through there, if that's acceptable. 11:17:36 11:17:40 11:17:44 11:17:47

MR. HULBURT: Yeah, of course. 11:17:48

BY MR. BERN:

Q. This -- the second page is a Virginia Slims advertisement. Is that an advertisement that depicts smoking in a social setting in your opinion? 11:17:53 11:17:55 11:18:00

A. I don't think it depicts it in a social setting. 11:18:04 11:18:06

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Support by https://www.industrydocuments.ucsf.edu/docs/tsjl0001

Q. Okay. What about -- I want to show you a whole bunch of these, so maybe we can -- what about -- I've got PX-BS-593 and 594. I'd ask you to take a look at 594. All right. Does that advertisement depict smoking in a social situation. 11:18:07 11:18:12 11:18:15 11:18:22 11:18:24

A. No. 11:18:27

Q. That's a Virginia Slims ad again, isn't it? 11:18:27

A. It is. 11:18:30

Q. Then I'd ask you to take a look at PX-BS-592, which is also a Virginia Slims. And if you could answer the same question, whether that depicts smoking in a social situation. 11:18:31 11:18:34 11:18:39 11:18:41

A. It doesn't depict it, though I believe it speaks to it. 11:18:48 11:18:52

Q. Can you just describe for me what -- how it speaks to a social situation? 11:18:52 11:19:01

A. Well, it speaks to the idea of mutual respect is the key to a good relationship, which means that it's speaking to a relationship which, by definition, is more than one person. It's speaking that they should be confident -- 72 percent of women feel confident asking for a raise in salary. And it seems to be saying you should be confident. The fact that the cigarettes are -- it clearly is relating the use of this product to building confidence and helping define yourself as a confident individual. Therefore, it leads to the idea that there's nothing particularly wrong with using these products in the 11:19:01 11:19:01 11:19:04 11:19:06 11:19:08 11:19:12 11:19:15 11:19:22 11:19:25 11:19:29 11:19:32 11:19:36

-- in the presence of other people. 11:19:41

Q. Would you say that this ad relates to women in the workplace to some degree? 11:19:43 11:19:45

A. Yes, it does. 11:19:47

Q. And would you agree that -- certainly since December 9th, '98, that smoking has been prohibited in the workplace in California? 11:19:49 11:19:53 11:19:55

A. It's prohibited in most workplaces, yes. 11:19:57

Q. And that ad doesn't actually show any women smoking, does it? 11:20:00 11:20:05

A. No, it doesn't. 11:20:05

Q. And it doesn't actually show any women together in a workplace, does it? 11:20:07 11:20:08

A. No. 11:20:10

Q. If you would take a look at PX-BS-590. It's another Virginia Slims ad. And if you could answer the question, does that ad suggest that it's normative behavior to smoke in social settings? 11:20:10 11:20:13 11:20:16 11:20:23

A. Suggest, possibly. Show, no. 11:20:30

Q. I'd like you to take a look at PX-BS-588, which is attached to this document. 11:20:34 11:20:42

THE REPORTER: Did you say 598?

MR. BERN: 588.

THE REPORTER: Thank you.

BY MR. BERN:

Q. And could you indicate whether that depicts smoking in a social situation? 11:20:44 11:20:47

A. I'm not sure what the situation is in this ad. 11:20:51 11:20:54

Q. Is it a social situation? 11:20:54

A. I can't tell from the picture. 11:20:56

Q. It doesn't -- does it -- it doesn't appear to be a smoking situation to you then -- a social 11:21:00 11:21:01

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/tsjl0001

situation to you then? 11:21:03
A. As I said, I'm not exactly sure of the 11:21:05
situation. 11:21:07
Q. Okay. Isn't there more than one person in 11:21:08
the picture? 11:21:10
A. There appears only one person portrayed in 11:21:11
the photograph. 11:21:13
Q. I'd like to switch to some Marlboro ads, if 11:21:21
I could. Would you take a look at PX-BS-600 and tell 11:21:24
me if that depicts smoking in a social situation. 11:21:29
A. It's possible. It's very hard from this 11:21:34
black-and-white Xerox to tell exactly what's going 11:21:38
on, but it appears to be an indoor location. I think 11:21:40
that's an ashtray. Again, very difficult to tell 11:21:46
from this black-and-white Xerox what's going on, if 11:21:48
anything, in the background. So the answer would be 11:21:52
"I'm not sure." 11:21:55
MR. BERN: Okay. We need to change the 11:21:55
tape. So let's take a break. 11:21:57
THE WITNESS: Okay. 11:21:59
THE VIDEOGRAPHER: This concludes Tape 1 of 11:21:59
Volume II in the deposition of Bruce Silverman. Off 11:22:01
the record 11:22 a.m. 11:22:04

(Recess taken.) 11:26:46
THE VIDEOGRAPHER: This begins Tape 2 of 11:27:17
Volume II in the deposition of Bruce Silverman. On 11:27:19
the record at 11:27 a.m. 11:27:23
BY MR. BERN:
Q. If I could backtrack for one minute, I had 11:27:25
a question about the Virginia Slims campaign. There 11:27:30
are a number of ads where you indicated that the 11:27:33
message was one of confidence. If the ad had the 11:27:35
message of expressing the lack of confidence of the 11:27:40
women instead of the confidence of the women, would 11:27:44
you deem that to be an ad that was not suggested -- 11:27:47
suggestive of smoking in a social situation? 11:27:52
A. I -- I don't know how to respond without 11:27:57
actually seeing an ad. I mean, I just -- I can't 11:28:00
visualize what that might be. 11:28:07
Q. Fortunately, we have some color ads for the 11:28:13
Marlboro ads, and I'll show you a few of those. If 11:28:16
you would take a look at PX-BS-709, which is a 11:28:18
Marlboro ad. Could you tell me whether that depicts 11:28:22
smoking in a social situation? 11:28:26
A. I don't think it does. 11:28:27
Q. Perhaps also you could take a look at 11:28:31
PX-BS-696, it's another Marlboro ad. Does that one 11:28:33
depict smoking in a social situation? 11:28:40
A. I think you could argue that it does. 11:28:44
Q. Please do so, if you could. 11:28:49
A. I think so. 11:28:51

Q. How is that? 11:28:53
A. I see two guys sitting around on the 11:28:53
ground. One guy is smoking, one guy isn't. 11:28:55
Q. Are they outside? 11:29:01
A. I think so. Looks like they are. 11:29:03
Q. May I see that. They don't appear to be 11:29:11
having a conversation, do they? 11:29:22
A. I would think they were. I mean, I look at 11:29:28
this, and I see a story, and that's what pictures -- 11:29:31
THE REPORTER: I'm sorry, I couldn't hear

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - https://www.industrydocuments.ucsf.edu/docs/tsjl0001

you. I'm hearing a conversation. "But I look at this" and?

THE WITNESS: When I look at an ad, what I've been trained to do is to look at the photographs in an ad as telling a story. It's not a moment in time. It's -- it's the middle of something that has a beginning and an end. Many years ago there was a theory advanced about how print advertising worked. And one of the key elements of constructing good advertising is doing something called story appeal, in which the reader is asked to look at it and say what's going on here and to become involved with it. Marlboro -- it is my opinion that Marlboro advertising, since the brand was repositioned in the '50s, has been among the best advertising that's been done in the world. 11:29:39 11:29:43 11:29:45 11:29:48 11:29:52 11:29:57 11:30:01 11:30:05 11:30:09 11:30:13 11:30:16 11:30:19 11:30:28 11:30:28

But I see story appeal here. So what I see is, it looks to me late in the day. It looks like 11:30:30 11:30:33

these two cowboys are taking a break before heading home. One is having a smoke. I don't know if the second guy smokes or not. Smoking is identified as a pleasurable activity. And the two guys are likely chatting with each other. Now, you know, cowboys are known to, unlike advertising people, be men of few words. So they probably say "yep" and "nope" a lot. But, yeah, I regard this as a social part of a work situation. And that would -- actually the idea of -- that I spoke about, is that moment in time and story appeal and what it means and what it rings out to people, would apply to any ad that is -- that is illustration based, as this ad is. 11:30:38 11:30:44 11:30:46 11:30:48 11:30:51 11:30:55 11:31:02 11:31:06 11:31:10 11:31:17 11:31:20 11:31:23 11:31:27

BY MR. BERN:

Q. Based on all the Marlboro ads that you've seen since December 9th, 1998, would you state, in your expert opinion, that the Marlboro campaign is one that is directed at depicting smoking in social situations? 11:31:29 11:31:32 11:31:35 11:31:39 11:31:43

A. No. 11:31:44

Q. Do you know what a standard -- I'm sorry, if you want to continue your answer. 11:31:54 11:31:56

A. I -- I -- I wonder if you could just read back that question. 11:31:58 11:32:00

Q. Oh, sure. "Based on all the Marlboro ads that you have seen since December 9th, 1998, would you state, in your expert opinion, that the Marlboro campaign is one that is directed at depicting smoking 11:32:01 11:32:04 11:32:09 11:32:10

in social situations?" "Answer: No." 11:32:13

A. Okay, "depicting," answer no. 11:32:17

Q. Would your answer change if I were to -- let me just ask you another question. In what way does the Marlboro campaign imply or sell the message that smoking in social situations is acceptable? 11:32:21 11:32:23 11:32:28 11:32:35

A. I think it furthers the historical -- historical strategy of the industry, and Marlboro specifically, in presenting cigarettes as something that is a pleasurable experience. That is something that helps identify individuals, that helps them define who they are in -- publicly. And that, therefore, it certainly doesn't work against smoking in social situations. And since smoking frequently takes place in social situations, it would further 11:32:38 11:32:43 11:32:47 11:32:53 11:32:56 11:33:03 11:33:08 11:33:12 11:33:16

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Legacy Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/tsjl0001

support that activity. 11:33:19
Q. So by abstention, by not affirmatively 11:33:21
countering the notion that smoking in social 11:33:29
situations is the norm, you think any other ad would, 11:33:32
in fact, support the prevailing view that smoking is 11:33:38
normative in social situations; is that your opinion? 11:33:42
A. If the advertising presents cigarettes, 11:33:45
presents smoking as a -- if the advertising presents 11:33:48
smoking in a positive way, I believe ultimately it 11:33:55
supports the idea that smoking is okay in -- smokers, 11:34:00
that it would be okay to smoke when you're in and 11:34:06
around other people, be it social or not social. 11:34:09
Q. Do you believe all -- all cigarette 11:34:12

advertising should be banned? 11:34:13
A. No, not at all. 11:34:16
Q. Could you devise a campaign, if hired, to 11:34:16
advertise the cigarettes in a way that you feel would 11:34:19
not depict, support, or otherwise imply that smoking 11:34:22
in social situations is acceptable? 11:34:26
A. I don't know. 11:34:29
Q. It would be hard, wouldn't it, based on 11:34:31
your testimony today? 11:34:33
A. Well, you asked me if I could do it. I -- 11:34:34
I used to be in the creative side of the advertising 11:34:37
business. I stopped doing that some years ago. 11:34:39
Q. Could your firm do it, if you asked people 11:34:42
there to do it? 11:34:44
A. No, because we're not in that business. 11:34:45
We're not an advertising agency. 11:34:46
Q. Okay.
A. We're a media agency. 11:34:48
Q. Have you ever smoked? 11:34:49
A. Yes. 11:34:51
Q. Did you find it pleasurable at the time? 11:34:51
A. Yes. 11:34:53
Q. Did you identify yourself as an individual 11:34:53
by the brand that you smoked? 11:34:56
A. I think I did. 11:34:58
Q. Did you think that smoking defined who you 11:35:01
were publicly? 11:35:03
A. I think, in looking back at it -- I really 11:35:05

and truly can't remember what I was -- what -- how I 11:35:08
felt about it at the time. But in looking back at 11:35:12
it, I suspect that, to a degree, it -- it played that 11:35:14
role. 11:35:17
Q. Okay. So in your view there's nothing 11:35:19
false about the advertising that we've been reviewing 11:35:21
here today by the tobacco companies with respect to 11:35:24
the messages that you indicate are -- are sent, that 11:35:27
is that smoking is pleasurable, that it identifies 11:35:33
individuals, and defines who they are publicly; is 11:35:36
that correct? 11:35:38
A. I don't know what you mean by -- about the 11:35:42
part where you -- the clause about "nothing false." 11:35:43
I just don't know what you mean. 11:35:46
Q. Well, would you agree that smoke -- to the 11:35:49
people who smoke cigarettes, oftentimes they find 11:35:52
smoking cigarettes pleasurable? 11:35:54
A. I think that smokers would say that they 11:35:56
find pleasure in it. 11:35:59
Q. And that people identify themselves as 11:36:01

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - industrydocuments.ucsf.edu/docs/tsjl0001

individuals by smoking cigarettes? 11:36:03
A. I think that some people do, yes. 11:36:05
Q. And that people define who they are 11:36:08
publicly by smoking cigarettes? 11:36:10
A. In some respects. 11:36:13
Q. So then, in sending those messages, you 11:36:14
don't find anything false or unethical on behalf of 11:36:25
the tobacco companies in -- in pursuing advertising 11:36:25

that sends those messages, do you? 11:36:28
A. Yes, I do. 11:36:28
Q. And what is that? 11:36:29
A. I -- given that -- that cigarettes are a 11:36:31
dangerous product, and they're a dangerous product, 11:36:36
and that seems -- that seems to have been accepted 11:36:41
even by some of the cigarette companies, promoting 11:36:43
these products as positively as they are currently 11:36:47
promoted, in the magazines which they're promoted and 11:36:51
in the manner which they're promoted, I find 11:36:56
unethical. 11:36:58
Q. Do you think that the cigarette companies 11:36:59
should advertise their products in a negative light? 11:37:01
A. I don't believe it has to be done in a 11:37:04
negative light, no. 11:37:05
Q. So you think it could be done not in a 11:37:07
positive light and not in a negative light? 11:37:08
A. I think that a lot of the cigarette 11:37:14
advertising is promoting smoking. I think that you 11:37:16
could be doing -- I think the cigarette advertise -- 11:37:19
the cigarette companies could be doing advertising 11:37:21
that attempts to differentiate their brands and to 11:37:25
fight -- fight -- fight the battle on, if you must 11:37:28
smoke, here's one brand versus another. But I think 11:37:32
what happens here is we're looking at advertising 11:37:35
that continues to glamorize smoking and promotes 11:37:37
smoking and promotes the idea that more people should 11:37:41
smoke, and promotes the idea, therefore, that you 11:37:45

should smoke that much more. 11:37:47
Q. Do you believe that cigarette advertising 11:37:49
should be made illegal? 11:37:50
A. I answered already. 11:37:52
Q. So you recognize that -- strike that. 11:37:56
Are you offering any opinions as an expert 11:38:00
in this case regarding the ethics of advertising by 11:38:02
tobacco companies? 11:38:05
A. I haven't been asked to. 11:38:08
Q. Okay. So then you won't be offering any 11:38:09
opinion or testimony in this case regarding the 11:38:11
ethics of advertising by the tobacco companies; is 11:38:14
that correct? 11:38:18
A. I don't know. 11:38:18
Q. Well, to date, you haven't been asked to do 11:38:20
that; is that right? 11:38:22
A. To date, I haven't been asked to do -- I've 11:38:24
not been asked the specific question, other than by 11:38:27
you, about what I feel is the ethics of tobacco 11:38:29
advertising. 11:38:33
Q. And your opinions that you've offered that 11:38:33
you testified to yesterday are not based on your view 11:38:35
of the ethics of the tobacco companies' 11:38:39
advertisements; is that correct? 11:38:43
A. I was in here yesterday for eight hours and 11:38:46

http://legacy.library.ucsf.edu/tid/bvr07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

15 minutes, less 45 minutes for lunch. I don't 11:38:48
remember the -- the -- the antecedent of every 11:38:53
question. Most of the questions had little to do 11:38:57

278

with specific advertising. They had to do either 11:39:00
with my background, they had to do with the creation 11:39:04
of the media plan, they had to do with the research 11:39:05
materials. I don't really think we talked very much 11:39:09
yesterday about advertising by the tobacco industry. 11:39:12
Q. So the opinions that you've offered 11:39:16
regarding the media plan that you've suggested and 11:39:17
how much it's going to cost are not in any way 11:39:21
predicated on the ethics of tobacco advertisements by 11:39:23
tobacco companies; is that correct? 11:39:28
A. I don't -- I don't think they're -- I don't 11:39:31
think it was predicated on the ethics of tobacco 11:39:34
advertising. I think they were predicated, though, 11:39:36
on the realities of the messaging that the tobacco 11:39:41
companies do send and have been sending for 11:39:45
generations. 11:39:47
MR. HULBURT: I'll represent to you, so 11:39:49
that it's clear, that in the context of his opinions 11:39:50
regarding the tobacco industry marketing related to 11:39:53
ETS and the current tobacco advertising and public 11:39:57
communications, which were two of the four expressed 11:40:01
opinions that he gave yesterday, that in the 11:40:07
discussion of those, and in the discussion of the 11:40:10
advertising he's reviewed, we will talk to him about 11:40:13
whether the messages are ethical, deceptive, 11:40:15
misleading, confusing, inconsistent, unfair within 11:40:19
the context of his opinion as a media expert. 11:40:24
MR. MILES: I'm going to represent to you, 11:40:32

279

we're going to object to your doing that based on the 11:40:35
disclosure --
THE REPORTER: I'm sorry. "I'll represent"
-- "I object"?
MR. MILES: That we're going to object to
your doing that at trial based on the limited nature 11:40:37
of this -- the disclosure you had for this witness at 11:40:39
the time that disclosure was made. 11:40:42
MR. BERN: We'll also object on the grounds 11:40:45
that the witness hasn't based any of his opinions on 11:40:47
the ethics of advertising by tobacco companies, and 11:40:49
that it was not included in the media plan or any 11:40:53
materials provided, any report provided by the 11:40:56
witness, or in any of his testimony. 11:41:00
MR. KAPLAN: Join. 11:41:07
BY MR. BERN:
Q. I want to explore a few of your other 11:41:11
clients and some of the advertising plans that you've 11:41:14
done for them. I understand that you don't do 11:41:19
content, at least not now. But previously did you 11:41:21
used to do content based work for your clients? 11:41:24
A. Prior to my joining Initiative Media, yes. 11:41:27
Q. I notice, for instance, that you did some 11:41:30
work for Suzuki. Can you tell me very briefly what 11:41:32
the nature of that -- I assume those were ads? 11:41:35
A. Yes. 11:41:37
Q. And do you remember what vehicles those 11:41:37
were for? 11:41:38

280

A. They were for the Suzuki Sidekick, which is 11:41:39

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

a SUV; and the Suzuki Swift, which is a passenger car; and for the RX7, which is a hybrid SUV passenger car. 11:41:45 11:41:51 11:41:57

Q. And let's focus on the -- on the Sidekick for a second, the SUV that you indicated. Do you recall what the media campaign was for that product? 11:41:57 11:42:01 11:42:12

A. I recall the media strategy. I don't recall the media plan in -- in any kind of detail. 11:42:12 11:42:12

Q. Do you remember any of the ads that came out of that media strategy? 11:42:16 11:42:17

A. Well, ads don't come out of a media strategy. You know, it just -- it doesn't work that way. 11:42:21 11:42:23 11:42:27

(Whereupon, Mr. Lendrum entered the proceedings.)

BY MR. BERN:

Q. Well, how are the ads developed after the media plan is developed? 11:42:27 11:42:29

A. Well, actually in that situation the media plan and the -- first, there's an advertising plan. Generally speaking, the media plan and a creative plan and creative executions are developed concurrently by separate teams within the agency. 11:42:31 11:42:34 11:42:37 11:42:40 11:42:42

Q. Okay. I don't want to waste a lot of time on this. So do you recall whether any of the ads were like the ones that I typically see for SUV's, that show SUV's driving up some dirt road to the top of some mountain somewhere? 11:42:46 11:42:48 11:42:51 11:42:54 11:42:57

A. Yes. 11:43:00

Q. Yes, you had those kind of ads? 11:43:01

A. We do. 11:43:04

Q. Okay. Did you feel that it was unethical to put those ads out there without, at the same time, expressing images to the potential customers of accidents that those cars were involved in with smaller cars and the harm that would be caused to people in smaller cars? 11:43:04 11:43:06 11:43:10 11:43:16 11:43:18 11:43:22

A. Actually, the -- 11:43:23

MR. HULBURT: Well, let me -- let me interpose an objection; that that assumes that the Suzuki Sidekick is a Suburban actually, is what I think your question assumes, and that the Suzuki Sidekick is other than a small car. 11:43:24 11:43:25 11:43:29 11:43:35 11:43:38

MR. BERN: He's testified it was an SUV. 11:43:41

MR. HULBURT: I know that, but your question assumes that it's a big car hitting a small car. 11:43:43 11:43:44 11:43:47

MR. BERN: That's the assumption, yes. 11:43:47

THE WITNESS: Yeah, the Suzuki Sidekick, as it happens, is the smallest SUV you can buy. It's smaller than most Honda passenger cars. 11:43:49 11:43:51 11:43:54

BY MR. BERN:

Q. Okay.

A. It's a very tiny thing. 11:43:57

Q. Were you to be devising one of the campaigns for the larger SUV's along the same lines as we just discussed with regard to images of these cars on mountain tops and the like, do you think that's an unethical campaign because it does not disclose to the potential consumer the risks of accidents to people in other cars? 11:44:00 11:44:03 11:44:06 11:44:09 11:44:12 11:44:16 11:44:20

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Internet Archive in 2014 https://www.industrydocuments.ucsf.edu/docs/tsjl0001

MR. HULBURT: Calls for speculation, it's an incomplete hypothetical, it's vague and ambiguous. 11:44:23 11:44:24

BY MR. BERN:

Q. Please answer, if you can. 11:44:29

A. I don't think that would be unethical, no. 11:44:30

Q. Do you think it's unethical that the ads don't depict the massive gas consumption that those automobiles -- the gas that those automobiles consume relative to more economical cars? 11:44:32 11:44:36 11:44:40 11:44:44

A. Yes. 11:44:47

Q. You do think that's unethical? 11:44:47

A. I do. 11:44:50

Q. Do you think it's unethical that they don't depict the destruction to the environment that is occasioned by the jaunts through the countryside or through the mountains and back country that's depicted in those ads? 11:44:51 11:44:54 11:44:58 11:45:02 11:45:04

MR. HULBURT: Same objections. 11:45:06

THE WITNESS: No. 11:45:10

BY MR. BERN:

Q. You would agree, wouldn't you, that when a SU -- a large SUV is in an accident with a smaller 11:45:10 11:45:14

car, that there's a high risk of serious injury to the person in the smaller car? 11:45:18 11:45:21

MR. HULBURT: Calls for speculation as to what kind of accident, what speeds, what situation. I mean, that is a wildly incomplete hypothetical question. 11:45:24 11:45:24 11:45:26 11:45:28

BY MR. BERN:

Q. You can answer. 11:45:29

A. I -- 11:45:35

Q. Let me rephrase it. 11:45:36

A. Yeah, please. 11:45:37

Q. Are you aware that there's a public debate regarding the safety of SUV's with respect to people in cars other than SUV's? 11:45:39 11:45:41 11:45:42

A. Yes, I am. 11:45:44

Q. And do you think it's unethical for companies to advertise SUV products without having a concurrent advertising program to educate the public about the risks to driving on the roads with SUV's? 11:45:46 11:45:48 11:45:55 11:45:59

A. I really don't have an opinion on it. 11:46:07

Q. I think you testified yesterday that -- that one of the goals of the media campaign was to reduce by 50 percent the number of people who still expose members of their family, or others, to ETS in their home or in their car; is that correct? 11:46:15 11:46:18 11:46:20 11:46:27 11:46:31

A. It's correct to the extent that we sort of created that as a target in our own minds. 11:46:34 11:46:36

Q. And you think that would be a -- that the program or the media campaign would be successful if it achieved that goal? 11:46:39 11:46:41 11:46:43

A. I think it's a reasonable goal. It was an arbitrary goal. We weren't given that goal by anybody. It was a goal we set out ourselves. 11:46:47 11:46:49 11:46:54

Q. Would you agree that at some point you run into diminishing returns trying to convince the last individuals not to smoke and expose others to ETS in the home, or in their cars, or elsewhere? 11:46:56 11:47:00 11:47:03 11:47:08

MR. HULBURT: That's asked and answered a couple times this morning. 11:47:10 11:47:11

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Support https://industrydocuments.ucsf.edu/docs/tsjl0001

THE WITNESS: I agree. 11:47:13
BY MR. BERN: 11:47:14
Q. Now, I believe the statistics showed that 11:47:15
somewhere around 50 percent of individuals in 11:47:20
California already have smoke-free homes; is -- is 11:47:23
that your recollection? 11:47:26
A. I believe that's -- 11:47:27
Q. So --
A. -- correct. 11:47:29
Q. So the goal of your campaign would be to 11:47:29
reduce the number of households where individuals are 11:47:36
exposed to ETS from 50 percent down to roughly 25 11:47:36
percent; is that correct? 11:47:39
A. Well, that's a generalization. Because 11:47:43
there are certain subsegments of the population where 11:47:47
the use of tobacco products in contact with other 11:47:50
people is much higher, and where the risks, for 11:47:54

various reasons, are greater. So it's tough to talk 11:47:57
about a general reduction because there are some -- 11:48:00
those subsegments are not at 50 percent. Some of 11:48:06
those subsegments are much higher right now. But I 11:48:10
would say that if we could achieve a 50 percent 11:48:14
reduction on average across the board, that that 11:48:17
would be -- that would be a good objective. 11:48:21
Q. Would you agree that with any media 11:48:26
campaign they're going to be some people that you 11:48:28
just will not be able to reach, no matter what? 11:48:31
A. Yes. 11:48:34
Q. Have you done any analysis to determine 11:48:37
what percentage of smokers in California can't be 11:48:39
reached with regard to the message of not exposing 11:48:43
people to ETS? 11:48:47
A. No. 11:48:51
Q. Are you familiar with the standard warnings 11:48:56
that are issued under Proposition 65? 11:48:57
A. Somewhat. 11:49:03
Q. You've seen them with regard to alcohol 11:49:04
purchases maybe that you've made? 11:49:07
A. I've seen them at gas stations, yeah, 11:49:09
things like that. 11:49:11
Q. Do you think those are effective warnings? 11:49:12
A. Not particularly, no. 11:49:16
Q. Do you think they change behavior? 11:49:18
A. No -- well, I'm sorry. I think they may 11:49:22
change behavior under certain circumstances. Yes. I 11:49:28

think they change behavior at the gas pump. I don't 11:49:31
know if they change behavior of people who want to 11:49:35
purchase alcohol products. 11:49:38
Q. How do you think they change behavior at 11:49:39
the gas pump? 11:49:40
A. I think people, as a result of seeing those 11:49:41
warnings, are more likely to try to -- this is purely 11:49:44
Bruce Silverman research. I always try to gas up my 11:49:49
cars by putting the nozzle in, setting the little 11:49:53
thing so that it just pumps away, and I stand back so 11:49:57
I'm not breathing fumes. I didn't used to be quite 11:50:00
as careful about it, but I guess that warning may 11:50:05
have had an effect. There's a warning not to use a 11:50:08
cell phone there, too, and I avoid that as well. 11:50:13
MS. SHERIDAN: Not to use a cell phone at 11:50:24
the gas station? 11:50:26

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 https://www.industrydocuments.ucsf.edu/docs/tsjl0001

THE WITNESS: At a gas pump. 11:50:28
MS. SHERIDAN: Oh, I've never seen that. 11:50:30
THE WITNESS: Yeah, that thing is pretty 11:50:31
invisible on a lot of things. 11:50:33
BY MR. BERN: 11:50:57
Q. Okay. I want to show you just a few more 11:50:58
documents from your file. First of all, do you think 11:51:09
it's important to the person receiving a message -- 11:51:15
strike that.
Does the -- is the impact of a message 11:51:21
received through advertising affected in any way by 11:51:24
the perception of who's sending that message? 11:51:27

A. Yes. 11:51:33
Q. Do you believe that the media campaign that 11:51:33
you've suggested would be effective if it was 11:51:35
expressly endorsed by and the ads indicated that it 11:51:39
was sponsored by and paid by the tobacco industry? 11:51:45
A. Could you repeat that. 11:51:49
Q. Sure. Do you believe that the 11:51:51
effectiveness of the media campaign that you've 11:51:52
proposed in support of your expert opinion would be 11:51:54
diminished if it was presented to the public as a 11:51:59
media campaign that was being conducted on behalf of 11:52:02
the tobacco industry? 11:52:06
A. I believe the effectiveness would be 11:52:08
diminished. 11:52:10
Q. So you're of the opinion that people are 11:52:11
going to be distrustful of the cigarette companies 11:52:13
with respect to any anti-smoking or anti-ETS 11:52:17
advertising that is done; is that correct? 11:52:21
A. Yes. 11:52:23
Q. If you'd take a look at a document that's 11:52:27
Bates numbered 2095500121 and 120, I guess these are 11:52:29
backwards. But if you would take a look at these two 11:52:37
pages. Have you ever seen these before? 11:52:41
A. Yes, I have. 11:52:49
Q. And you reviewed that in conjunction with 11:52:51
preparation for your deposition? 11:52:52
A. Yes. 11:52:54
Q. I'll represent, for the record, that that's 11:52:56

a core mission statement and core value statement 11:52:57
from Philip Morris. And the question I have for you 11:53:02
is whether your opinions with respect to the media 11:53:05
plan that you're offering are in any way based upon 11:53:09
the mission statement or the core value statement of 11:53:13
Philip Morris? 11:53:15
A. I'm sorry. I'm sorry, I -- I decided to 11:53:18
reread it. Would you please repeat that. 11:53:21
Q. Sure. Have you had the chance to reread it 11:53:24
now? 11:53:26
A. Yeah. 11:53:26
Q. Are the opinions that you're offering as an 11:53:26
expert witness in this case based in any way upon 11:53:28
Philip Morris's mission statement and core value 11:53:32
statement contained in the document in front of you? 11:53:34
A. No. 11:53:37
Q. If you would also take a look at document 11:53:39
2063123083 and 3084. This is Philip Morris's 11:53:42
statement of position dated October 2nd, 1997. 11:53:49
A. Yes, sir. 11:54:34
Q. Are the opinions that you're offering as an 11:54:35

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

expert witness in this case based in any way upon Philip -- Philip Morris's statement of position dated October 2nd, 1997? 11:54:38 11:54:42 11:54:44

A. Specifically? 11:54:46

Q. Yes. 11:54:47

A. No. 11:54:53

Q. I think yesterday you indicated that some of the advertising practices of the tobacco companies had improved or changed in a way that you thought was positive since December 9th, 1998; is that correct? 11:54:56 11:54:56 11:55:00 11:55:03

A. Yes. 11:55:08

Q. I want to show you a document Bates stamped C-IR-84 and 85, which is a printout, looks like from a Web page, an article. Have you ever seen this article before? 11:55:10 11:55:12 11:55:19 11:55:24

A. Yes, I have. 11:55:25

Q. And this article talks about Philip Morris dropping advertising from certain magazines; is that correct? 11:55:27 11:55:31 11:55:35

A. Yes. 11:55:35

Q. And do you happen to see the date on that? 11:55:36

A. It's -- the date on -- yeah, June 5, 2000. 11:55:40

Q. And do you think that this is a positive step taken by Philip Morris with regard to its advertising as it relates to your opinion regarding advertising and ETS? 11:55:45 11:55:47 11:55:49 11:55:53

A. Yes. 11:55:56

(Exhibit 849 marked for identification.)

BY MR. BERN:

Q. I think you also testified that -- yesterday that some of your opinions were based on statements taken from the Web pages of the various tobacco companies. And I want to show you some excerpts from Philip Morris's Web page. I don't know why these documents are not Bates stamped. I think 11:55:56 11:56:03 11:56:06 11:56:09 11:56:12 11:56:15

they were probably produced without Bates stamps. So we'll have to mark these pages as an exhibit next in order, which would be 849. And I'm just going to put them all together. Actually, this one is a four-page document entitled "Secondhand Smoke" dated July -- well, it looks like it was printed on July 12, 2000. I don't see a date on the document itself. If you could review that document. 11:56:18 11:56:25 11:56:30 11:56:32 11:56:37 11:56:41 11:56:44 11:56:47

MS. SHERIDAN: Why don't you indicate for the record that it's Philip Morris's Website, so there's no confusion. 11:56:49 11:56:50 11:56:53

MR. BERN: Yes.

BY MR. BERN:

Q. What, if anything, contained in that excerpt from the Philip Morris Website supports your opinion that statements made in the tobacco company's Websites are misleading with regard to environmental tobacco smoke? 11:56:55 11:58:01 11:58:04 11:58:06 11:58:09

A. In reading through this -- number one -- number one is, the statements made in the Websites, which by their very nature address a tiny proportion -- tiny, tiny proportion of the public, don't seem to be embodied regarding ETS, or regarding the overall tobacco issue, where -- don't seem to be then followed through in the -- in their -- in the promotional practices of the companies. You go into 11:58:14 11:58:20 11:58:25 11:58:30 11:58:34 11:58:41 11:58:45 11:58:48

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Legacy Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/tsjl0001

retail establishments where there are just tremendously heavy levels inside the stores of 11:58:56 11:59:00

291

tobacco promotional advertise -- call it promotional advertising, point of sale type advertising, et cetera, often in an environment where young people can see it, et cetera. 11:59:04 11:59:08 11:59:12 11:59:17

Then, very specifically, as you look at the way these -- these articles are written, there's all sorts of quibbles. It's sort of like -- you know, you can interpret it, very easily interpret it as, "Well, they're making us do this, but we really don't believe it, and we don't really agree." So it's just the nature of the language. 11:59:18 11:59:21 11:59:25 11:59:32 11:59:35 11:59:38 11:59:41

I'll quote one, if you'd like, as an example of what I'm speaking of. And I'll -- on page 3 of this document, you know, in a -- in a subheading of "Young Children and ETS." "If a child is present who's asthmatic, or often experiences conditions such as cough, wheeze, lower respiratory infection or otitis media, we would encourage parents to consider whether or not that child should be exposed to any significant level of ETS." Now, you know, there's a big difference to me between saying "We think you should consider it, especially when you have children who have these particular conditions" as saying "We really recommend you don't." Now, you know, certainly in our society everybody has choices to make, and we live in a free society. But this, to me, quibbles the line. 11:59:44 11:59:46 11:59:57 12:00:03 12:00:07 12:00:10 12:00:14 12:00:16 12:00:20 12:00:25 12:00:28 12:00:32 12:00:34 12:00:38 12:00:41 12:00:46

The other part of it is, even with -- in reading this, you're describing children who are asthmatic or who have other respiratory problems. And that's where you say you should really strongly consider it, as opposed to in general, don't do this. So, you know, I don't see -- I see progress. But I don't see strong affirmative statements where -- where they could be made. 12:00:48 12:00:51 12:00:55 12:00:59 12:01:02 12:01:10 12:01:15 12:01:20

292

And even on the entire subject of ETS, as you read through this, they're -- well, they're basically saying, "Well, you know, we're not going to debate this anymore," but we -- but you can -- you certainly -- the next parenthetical thought is "but there's certainly still a matter of debate." I'm not sure. 12:01:26 12:01:29 12:01:33 12:01:35 12:01:37 12:01:40 12:01:45

My job as an advertising guy is to look at advertising, make advertising, run advertising, evaluate advertising, and not necessarily evaluate the content of material of Websites. But it just seems to me that, as a communicator, and I think I do know something about that, one could communicate far more unequivocally. 12:01:47 12:01:50 12:01:52 12:01:55 12:02:01 12:02:04 12:02:07

Q. So how does this support your opinions in the case? 12:02:11 12:02:14

A. Well, my opinions in the case is that the advertising that is being done still -- is still promoting the use of tobacco products in an unfettered manner, that there are not boundaries being placed. And I believe that, given the health risks of the products -- of these products, that the advertising could find ways to begin the process of 12:02:14 12:02:16 12:02:27 12:02:27 12:02:30

293

12:02:31 12:02:34

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/tsjl0001

contributing to limitation of use. Tobacco 12:02:43
advertising has been running for 120 years. You 12:02:51
don't change it. You know, it's like a few weeks 12:02:54
ago, I was on the Queen Elizabeth II. It's this big 12:02:59
ship. When they were docking it, one of the things I 12:03:04
realized, it's real hard to turn it around. 12:03:07
Q. So I guess what I'm -- what I'm hearing you 12:03:15
saying is that you see improvements by the tobacco 12:03:16
companies, in this instance Philip Morris, and that 12:03:19
you don't fault them for not having made more 12:03:22
improvements more quickly, because it's hard to turn 12:03:24
a ship of that size around? 12:03:27
A. I didn't say that, nor did I intend it. 12:03:29
First of all, the documents you asked me to look at 12:03:33
are Philip Morris's documents. So I'm only going to 12:03:36
comment on these documents, and very specifically 12:03:40
Philip Morris. What I'm saying is that I think 12:03:43
Philip Morris right now could be going further in 12:03:44
these documents in advising the public about 12:03:46
behavioral characteristics regarding secondhand 12:03:51
smoke. They could be -- they could be far more clear 12:03:54
and far more directive in what they're giving. In 12:03:57
Philip Morris's advertising, at least the advertising 12:04:04
that I've looked at for these two brands, it seems to 12:04:05
me that Philip Morris could be working harder and be 12:04:09
more productive at changing people's behavior 12:04:13

patterns regarding smoking. 12:04:17
What I'm saying about slowing things -- 12:04:21
about hard to turn -- what I'm saying is, it's very, 12:04:23
very difficult to turn society around after decades 12:04:26
of the cigarette industry rather brilliantly 12:04:32
promoting the use of smoking, promoting that 12:04:40
practice. 12:04:46
Q. I think there was a line of questioning at 12:04:46
the end of the day yesterday that touched upon that 12:04:47
point about there being -- your opinion being based 12:04:49
on the sort of decades-long advertising that has 12:04:52
impacted societal norms and behavior. The question 12:04:56
I'd like to ask is, is it possible for you to break 12:05:01
out just those aspects of tobacco industry 12:05:04
advertising after December 9th, 1998, and to have an 12:05:07
opinion that applies only to the impact of those ads 12:05:12
for that time period from the 19 -- December 9th, 12:05:15
1998 to the present? 12:05:18
A. Well, in a very macro way, yes, because I 12:05:21
could look at ads that have been produced and look at 12:05:24
media schedules, which is just as relevant as the 12:05:26
advertising themselves, and give opinions about what 12:05:29
seems to be happening, what the cigarette companies 12:05:34
seem to be attempting with advertising right now. 12:05:37
Q. I take it that opinion would be different 12:05:41
than the opinion that you've offered based on the 12:05:42
decades of advertising and -- and impact on society; 12:05:44
is that correct? 12:05:47

MR. HULBURT: Calls for speculation. 12:05:48
BY MR. BERN:
Q. You can answer. 12:05:50
A. I don't see how the current advertising, in 12:05:52
terms of the effect it has on the population, can be 12:05:57
evaluated without recognizing the context in which it 12:06:00
operates. 12:06:05

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Legacy Industry Documents Library - industrydocuments.ucsf.edu/docs/tsjl0001

Q. So it can't really be analyzed outside of the historical context; is that correct? 12:06:06 12:06:09
A. I think you have to consider the historical context, and where the public -- what this country -- what the world has been trained to believe. 12:06:10 12:06:12 12:06:18
Q. All right. You believe in -- in application of the first amendment towards advertising, do you not? 12:06:21 12:06:24 12:06:28
A. Yes, I do. 12:06:30
Q. And you believe that people should be free to advertise their product, as long as they're not falsely advertising it? 12:06:30 12:06:31 12:06:35
A. I don't believe that you -- I strongly believe you should not be doing false advertising. I also believe that you should not be doing inappropriate advertising. As I recall, there was a -- there was a finding about the first amendment was that you can't yell "fire" in a theater if there isn't a -- if there isn't a fire. So that there are certainly limits. I believe that almost any product, but especially ones that have been found and 12:06:42 12:06:44 12:06:47 12:06:49 12:06:54 12:06:56 12:07:00 12:07:04 12:07:09

acknowledged to be dangerous, owe the public a higher responsibility in the way they -- the way they communicate. 12:07:12 12:07:16 12:07:20
Q. Do you feel that current tobacco advertising rises to the level of calling "fire" in a theater? 12:07:20 12:07:22 12:07:26
A. I don't know how to make the analogy, I'm sorry. 12:07:29 12:07:31
Q. Do you think the current tobacco advertising is inappropriate? 12:07:31 12:07:34
A. I believe that much current tobacco advertising remains inappropriate. 12:07:35 12:07:37
Q. Yesterday you testified that kids oftentimes want to smoke because they want to express that they are no longer kids, that they have made it to adulthood; is that correct? 12:07:42 12:07:44 12:07:48 12:07:51
A. I don't know whether or not they've made it to adulthood, but they want to act like -- they want to act older. They want to act more independently, yes. 12:07:54 12:07:57 12:08:00 12:08:03
Q. That's exactly what I meant, yes. 12:08:03
As a result, is it not true that advertisements that are designed to reach adult audiences will appeal to those children or teens who want to smoke, because they want to express their view that they are now adults or should be treated like adults? 12:08:07 12:08:10 12:08:16 12:08:22 12:08:25 12:08:27
A. Could you repeat. I missed the first part, 12:08:31

or at least I didn't connect the first part of your question with the second. 12:08:33 12:08:41
Q. Let me try again. Given that children or teens want to smoke because they want to express that they are no longer children and that they perceive themselves as adults, does it not follow that advertisements that are designed to appeal to adults also will appeal to these teens or children? 12:08:41 12:08:47 12:08:52 12:08:54 12:08:58 12:09:01
A. It may -- or they may. 12:09:04
Q. Do you consider advertisements that are geared towards an adult audience, but which also appeal to minors, to be improper marketing of a 12:09:13 12:09:16 12:09:20

http://legacy.library.ucsf.edu/tid/bvr07a00/pdf
Digitized by the Internet Archive in 2014 https://www.industrydocuments.ucsf.edu/docs/tsjl0001

product to -- to youth? 12:09:26
A. The way I would respond to that is that I 12:09:39
do think that there are ways to do advertising from a 12:09:42
creative standpoint. There are ways to do 12:09:48
advertising for tobacco products for adults that 12:09:51
might be less appealing for kids. Some are more 12:09:54
appealing, some are less appealing. The other factor 12:09:58
that plays into it is where the advertising runs the 12:10:01
media selection and how the media's used, because 12:10:06
there are -- there are ways of tremendously 12:10:09
segregating the advertising away from kids. 12:10:11
Q. If we could just focus on the content side 12:10:15
of your answer, isn't it going to be true that the 12:10:18
more you target your advertisements towards an adult 12:10:22
audience, the more that the segment of the youth 12:10:25
audience that wants to express their adulthood, that 12:10:29

they're going to find that attractive? 12:10:33
A. Not necessarily. Because it's -- when 12:10:35
you're dealing with this form of communication, 12:10:39
there's some very subtle factors that -- that can 12:10:42
change that equation. In focus group research, for 12:10:44
example, that was conducted for the California 12:10:51
Department of Health Services, television commercials 12:10:55
-- certain television commercials were -- were 12:10:58
basically -- that were shown to kids or teens, that 12:11:01
weren't intended for them, they couldn't make hide 12:11:06
nor hair of it. It was irrelevant to them. 12:11:09
(Interruption in proceedings.) 12:11:28
(Discussion off the record.) 12:11:33
THE WITNESS: So what I was saying is that, 12:11:33
you know, there -- this is a pretty subtle area. 12:11:36
There are some ads that certainly are going to be 12:11:44
more -- that young people -- younger people are going 12:11:47
to respond to and relate to more than others. That's 12:11:52
-- that will -- and there are some -- you know, there 12:11:59
are some that will relate to everybody, and there are 12:12:01
some that will relate to nobody. 12:12:04
MR. BERN: Okay. I have no further 12:12:06
questions. Let's go off. 12:12:07
THE VIDEOGRAPHER: Should we go off? 12:12:11
MR. BERN: Yeah.
THE VIDEOGRAPHER: Off the record at 12:12 12:12:12
p.m. 12:12:16
(Whereupon, the lunch recess was taken at 12:12 p.m.)

SAN DIEGO, CALIFORNIA; FRIDAY, AUGUST 4, 2000
1:17 P.M.

THE VIDEOGRAPHER: We are back on the 13:17:31
record at 1:17 p.m. 13:17:32

EXAMINATION BY MR. KAPLAN:
Q. Good afternoon, Mr. Silverman. You 13:17:36
probably remember me. My name is Brad Kaplan. I was 13:17:39
the one that took a day's worth of your testimony in 13:17:42
your percipient capacity last week. I'll remind you 13:17:45
again, my client is a company called Lorillard 13:17:48
Tobacco Company. Let me start off first following up 13:17:50
on an area that Mr. Bern was concluding with as he 13:17:55
finished his questions. 13:17:59
In your expert opinion, based on your 13:18:01
experience purchasing media and in the advertising 13:18:04

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

industry, can one create an effective advertising campaign to sell a product to an 18-year-old where the same campaign is not effective at selling the product to a 17-year-old? 13:18:07 13:18:13 13:18:20 13:18:24

A. It would be very difficult. 13:18:31

Q. In your opinion is it possible? 13:18:34

A. I suppose, if you were restricting all the advertising efforts to direct mail, and if you could make sure the lists were perfect, I suppose one could do that. 13:18:44 13:18:47 13:18:52 13:18:57

Q. If your advertising campaign is not limited exclusively to direct mail, do you believe that one could create and implement an advertising campaign to sell a product which would be effective at selling the product to 18-year-olds but not effective at selling the product to 17-year-olds? 13:18:57 13:19:02 13:19:05 13:19:09 13:19:11 13:19:14

A. I don't know if they're equally effective. You know, I mean -- you know, I think that if you're targeting an 18-year-old, and there may be some ways to create barriers by media choice, but likely it's going to be extraordinarily close. I just -- I don't think you can. 13:19:23 13:19:25 13:19:28 13:19:34 13:19:41 13:19:45

Q. Can you identify for me any barrier by media choice which you believe would be effective at limiting an advertising campaign to reaching 18-year-olds but not reaching 17-year-olds, other than direct mail? 13:19:47 13:19:50 13:19:53 13:19:57 13:20:03

A. Well, yes. You know, when you -- you select magazines, there are some magazines -- magazine readership -- I'm not talking about subscript -- subscriber base, but actual readership. There are some magazines that have -- that it is -- it's -- it's reasonable to believe that there are some magazines that have 18-year-old readers that might not have 17-year-old readers. It's not likely. But you don't create advertising for people in one age -- one specific age that -- I don't know any way to do that. And media demographics being what they are, you buy -- media targets and media buys are made on demographic breaks, and the demographic breaks are 18, 24. So it depends how you're skewing it. If you're skewing towards the older end of the demo, you'll have far fewer 17-year-olds affected by that advertising campaign. If you're skewing towards the 18-year-olds, you're going to pick up a whole lot of 17-year-olds. 13:20:04 13:20:07 13:20:10 13:20:13 13:20:15 13:20:22 13:20:24 13:20:29 13:20:33 13:20:37 13:20:42 13:20:46

13:20:50 13:21:01 13:21:01 13:21:01 13:21:06 13:21:09 13:21:11

Q. Can you identify for me a magazine which you believe is read by dominantly 18-year-olds and not 17-year-olds? 13:21:12 13:21:14 13:21:18

A. No. 13:21:19

Q. During the course of yesterday's testimony you spent some time talking about the California Prop 99 campaign and today a little bit talking about California Prop 10. And I'd like to focus your attention in on those propositions. Let me start with Prop 99. You indicated your belief as to what the goals or priorities were for the Prop 99 campaign; do you recall that testimony? 13:21:25 13:21:27 13:21:32 13:21:34 13:21:37 13:21:39 13:21:44 13:21:48

A. Uh-huh. 13:21:50

Q. What is your understanding as to what the State of California considers its priority areas to 13:21:50 13:21:54

http://legacy.library.ucsf.edu/tid/bvi07a00/pdf Digitized by http://industrydocuments.ucsf.edu/docs/tsjl0001

be with respect to its media campaign funded by Prop 99? 13:21:59 13:22:03
A. What -- what do you mean by "priority areas"? 13:22:06 13:22:08
Q. Are you aware as to whether or not the State of California has determined priorities for its media program funded by Prop 99? 13:22:12 13:22:14 13:22:19
A. Well, in -- in responding to your question, when you speak of priorities, are you talking about media priorities? Are you talking about subject matter priorities? Are you talking about demographic priorities? 13:22:24 13:22:28 13:22:31 13:22:34 13:22:37
Q. I'm using -- 13:22:39
A. I'm sorry, I don't know your priorities. 13:22:40
Q. I'm using the word "priority" in the generic sense, not in the media specific sense. So what is your understanding as to what the target issues are that the State of California is attempting to address with its media campaign funded by Prop 99? 13:22:41 13:22:43 13:22:46 13:22:50 13:22:54
A. The target issues the Prop 99 campaign is attempting to address, target issues, have to do with tobacco use. And the objective of the campaign is to reduce prevalence of smoking in California by reducing tobacco uptake among new users and promoting cessation among existing users. That's the objectives of the campaign. 13:23:01 13:23:07 13:23:09 13:23:12 13:23:15 13:23:20 13:23:26
Q. Was that -- were those, to your knowledge, the original objectives of the campaign when it was first put into place in the late 1980s and early 1990s? 13:23:28 13:23:31 13:23:32 13:23:38
A. Yes. In fact, the original objectives actually quantify the prevalence rate, or at least the reduction in prevalence rate that they wanted to achieve by the year 2000. 13:23:39 13:23:42 13:23:46 13:23:49

303

Q. And what is the basis -- strike that. 13:23:51
What information have you reviewed that leads you to that conclusion? 13:23:55 13:23:57
A. The -- the request for proposals that were submitted to the advertising community in soliciting potential contractors for the Prop 99 media campaign. 13:24:00 13:24:04 13:24:08
THE VIDEOGRAPHER: Counsel, I'm sorry to interrupt, but your microphone is picking up the noise from your computer, and maybe if you move the mike up higher. 13:24:14 13:24:15 13:24:17 13:24:19
MR. KAPLAN: Is that better? 13:24:25
THE VIDEOGRAPHER: See how that works. 13:24:27
BY MR. KAPLAN: 13:24:30
Q. Other than the request for proposal that you reviewed in the early 1990s, do you have any other source of information from which you draw the conclusion as to what the State of California's target issues were related to Prop 99? 13:24:30 13:24:34 13:24:39 13:24:41 13:24:44
A. Yes. Dealing with the clients. 13:24:46
Q. And when you're talking about dealing with the clients, you're talking about dealing with people at the Tobacco Control Section of the State of California's Department of Health Services, true? 13:24:50 13:24:53 13:24:54 13:24:57
A. That's correct. 13:24:59
Q. Do you have any information as to whether or not the discussions you had regarding the State of California's target issues were limited only to those 13:25:01 13:25:02 13:25:08

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/tsjl0001

issues about which Asher and Partners was to receive funding for advertising? 13:25:11

304

13:25:17

A. No. We spoke about the total -- the total media campaign as well -- the media campaign, which they defined as the -- the public communications programs, including advertising and public relations. I was also aware of their -- their own directed community outreach programs, working with the voluntary organizations up and down the state. 13:25:22 13:25:27 13:25:31 13:25:37 13:25:42 13:25:46 13:25:51

Q. To your knowledge, did the target issues for the Prop 99 campaign ever change? 13:25:56 13:26:00

A. The objectives -- the objectives didn't change. The -- you know, unfortunately, you know, you -- you folks live in the world of semantics, and so do I, because if you're in the communications business, that applies. If we're speaking about the goals, the marketing goals, if you will, of this statewide social marketing campaign, which they call a media campaign, the goals were to reduce prevalence rates. How you do that are strategies and tactics. The strategies emphasis was changed over time. Certain strategies were -- rose higher in the list of priorities than others, and they would go up and they would go down from year to year, depending on various circumstances. 13:26:10 13:26:14 13:26:18 13:26:21 13:26:24 13:26:26 13:26:30 13:26:34 13:26:40 13:26:43 13:26:48 13:26:54 13:26:56 13:27:01

Q. Did you ever learn that a topic other than the prevalence rate of smoking in the state of California was a target issue for the Department of Health Services Tobacco Control Section with respect to Prop 99 funding? 13:27:11 13:27:11 13:27:11 13:27:15

305

13:27:16

A. To my view, the ultimate objective was always prevalence rate. Prevalence rate and cessation. 13:27:27 13:27:29 13:27:32

Q. And I'm not asking to your view. What I'm asking is, did you receive any information that the State of California's Tobacco Control Section had a different view? 13:27:33 13:27:36 13:27:39 13:27:42

A. Well, you know, they certainly -- you know, they certainly -- they -- they also confused objectives and strategies. So there were periods when we would be told that they wanted emphasis placed in certain areas. They didn't always tell us the reasons. But, for example, there would be emphasis -- more emphasis placed in certain years on focusing attention on tobacco in youth. There would be certain times when emphasis would be placed on youth access. There would be emphasis placed at different times on -- there might have even been emphasis on ETS. 13:27:44 13:27:45 13:27:49 13:27:53 13:27:57 13:28:01 13:28:05 13:28:10 13:28:14 13:28:19 13:28:23 13:28:28

But I would -- you know, the way -- you know, the way I differentiate this in my mind, based on my training, is I look at these in changing emphasis and strategies where the -- the ultimate goal of Prop 99, as far as I can recall, did not change. 13:28:30 13:28:34 13:28:38 13:28:42 13:28:46 13:28:49

Q. As you sit here today, do you ever recall anybody from the State of California telling you that the emphasis should be moved to environmental tobacco smoke issues with respect to the Prop 99 campaign? 13:28:51 13:28:54

306

13:28:55 13:28:59

A. No. 13:29:02

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf Digitized by the Internet Archive in 2014 https://industrydocuments.ucsf.edu/docs/tsjl0001

Q. Did you ever ask anybody from either the Preston Gates & Ellis firm or the Thorsnes firm to provide you with any information regarding the Prop 99 campaign? 13:29:05 13:29:09 13:29:14 13:29:18

A. No. 13:29:20

Q. Did anybody from either of those two law firms ever, in fact, provide you with any information regarding the Prop 99 campaign? 13:29:21 13:29:23 13:29:25

A. Yes. 13:29:31

Q. What information was provided to you regarding the Prop 99 campaign by the plaintiff's counsel? 13:29:32 13:29:35 13:29:38

A. I was provided with a copy of the evaluation that was done by the USC team, which we keep referring to as the Andy Johnson document. There may have been some other similar materials in that stack of paper. 13:29:38 13:29:42 13:29:46 13:29:57 13:30:00

Q. Are you familiar with whether or not the State of California legislators required the California Department of Health Services Tobacco Control Program to provide to it a synopsis of the work which had been performed under Prop 99? 13:30:04 13:30:08 13:30:13 13:30:17 13:30:21

A. I believe that is correct. 13:30:24

Q. And you understand that the title of that document is toward a tobacco free California? 13:30:25 13:30:27

A. I don't know that. 13:30:31

(Whereupon, Mr. Lendrum entered the proceedings.)

BY MR. KAPLAN:

Q. You are aware, however, that the Department of Health Services Tobacco Control Program did, in fact, submit to the legislator -- the legislators a document which summarized what was going on on three-year periods for the Prop 99 campaigns? 13:30:33 13:30:36 13:30:38 13:30:41 13:30:44

A. I'm aware that reports were made. 13:30:49

Q. Have you ever seen one of those reports? 13:30:51

A. Yes. 13:30:56

Q. What was the first one of those reports which you saw? 13:30:57 13:31:00

A. I don't recall. 13:31:01

Q. Have you seen more than one? 13:31:01

A. I don't recall.

http://legacy.library.ucsf.edu/tid/bvn07a00/pdf
Digitized by the Internet Archive in 2014 http://industrydocuments.ucsf.edu/docs/tsjl0001